The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

Volume 26, Issue No. 6 November 2004

Public Defenders Seek Relief from Heavy Criminal Caseloads
The Messenger

Attorney: Public Defenders are Stretched Too Thin
Appalachian News-Express

In Defense of the Defenders

***Appalachian News-Express* Editorial**

There's a couch in the Department of Public Advocacy's Pikeville office with two pillows and a blanket. On a table beside the couch is an iron and ironing board. There's a stocked kitchen and bathroom.

The signs are everywhere, and not only do they show an overworked group of six attorneys. They also show the desperate need for help not only in Pike, but for public defenders all over the state.

In a recent press release announcing the newest data on caseloads for public defenders, State Public Advocate Ernie Lewis said something must be done to decrease the workloads of the state's public advocates; not only for their sakes, but for the sake of the defendants.

"The people of the commonwealth want to believe that the quality of justice provided an accused does not depend upon the money available to pay a lawyer. These caseloads threaten that fundamental belief," he wrote.

Harolyn Howard, directing attorney for the Department of Public Advocacy's Pikeville office, said the attorneys in the Pike office, which also covers Floyd County, have seen their caseloads increase by 10%. Instead of the recommended 350 cases per year, the six attorneys are averaging 477.3.

And in recent years, the addition of drug, family and other courts, combined with a known drug epidemic that is driving more and more people to commit crime, the numbers don't seem to be slowing down.

Besides the toll this takes on the individual attorneys, defendants also are on the losing end, whether it be by having to wait longer to go to court or by not getting all the attention they would naturally get if the defender had more time.

With all the ails Kentucky has financially, this should rank near the top of the list of things that need fixed. And the only way to fix it is the have more public defenders.

Everyone is guaranteed the right to a speedy trial and to competent counsel. Anything less is unconstitutional and simply shouldn't be accepted.

*Reprinted with permission from **Appalachian News-Express**, October 10, 2004.*

Public defenders' Caseload Exploding
Messenger-Inquirer

Report: State's Defenders Overtaxed
The Kentucky Post

Added Public Defender Leaves Paducah Area Still Off Target
Paducah Sun

Cranking Up the Caseload
Snitch

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Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Justice & Public Safety Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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Paid for by State Funds. KRS 57.375

FROM THE EDITOR...

Jeff Sherr

Justice Jeopardized. On September 27, 2004, Public Advocate Ernie Lewis issued a press release announcing the continuing increase in the caseload of Kentucky's public defenders. Newspapers throughout the Commonwealth have started running articles about the impact of the crushing caseload. This edition features two articles from the *Appalachian News-Express* and stories from two of Kentucky's public defenders. For more information on the specifics of the DPA's caseload see *Legislative Update*, No. 19, Spring 2004, found at http://dpa.state.ky.us/library/legupd/default.html.

Crisis Intervention Teams. With support of the National Alliance of the Mentally Ill and other community based mental health services, several Kentucky police departments have created crisis intervention teams trained to deal with a person in psychiatric crisis.

The Learning Disabled Person's Ability to Waive *Miranda* Rights. Dr. Diana McCoy offers the typical cross-examination of an expert testifying during a suppression hearing. This provides a clear explanation of the differences between mental retardation and learning disability in examining whether an individual can knowingly, intelligently and voluntarily waive *Miranda* rights.

Drug Summit Report. Public Advocate Ernie Lewis summarizes the findings and recommendations from the *Statewide Drug Control Assessment Summit of 2004*.

Conflicts of Interests in a Public Defender System. Post Trial Division Director Rebecca Ballard DiLoreto discusses the law and practice of cases that involve imputed disqualification as it impacts a statewide public defender system from the perspective of the attorney, the supervisor and the client.

Coming in January 2005. The next edition of *The Advocate* will be the 5th edition of the DPA Evidence Manual.

Jeff Sherr

PUBLIC DEFENDERS STRETCHED TOO THIN, ATTORNEY SAYS

Shawn Hopkins

*Reprinted with permission from **Appalachian News Express**, October 8, 2004.*

Regardless of how much money they have, who they are or what they're charged with, defendants in criminal cases have a legal right to an adequate defense. A local public defender says an "ever-increasing" caseload has begun to compromise that right across the state, including Pike and Floyd counties.

Harolyn Howard, directing attorney for the Department of Public Advocacy's Pikeville office, said that, in the last year, the six attorneys working the Pikeville office that covers Pike and Floyd counties have seen their caseloads rise from an average of 426.3 cases per attorney to 477.3, a more than 10 % increase.

A *Blue Ribbon Group* report from 1999 suggests a caseload of 350 cases per attorney in rural areas.

Howard said there are several reasons for the increasing caseload for public defenders, including economics. "I think the number of cases being filed is increasing," she said. "And there are fewer people who are able to afford an attorney."

In the past, Howard said, public defenders only had to deal with district and circuit courts, but juvenile, family and drug courts have been added. "There was new funding made available to put new judges in. And there were additional prosecutors assigned. But there weren't any additional provisions made for public defenders in those courts," she said.

Overworked public defenders lose a "big chunk" of their lives and time with their families, Howard said, as they work massive amounts of overtime to meet court dates.

"We do whatever we have to do. Whatever hours we need to put into it," she said.

Howard recounts one Floyd County case that put her at 66 hours of overtime in two weeks.

This summer, a Pike County death penalty case had Howard spending many nights on a couch in the break room at her office. An ironing board and iron still sit on the table in that room and pillows and a cover on the couch show signs of another attorney's overnight stay.

But Howard is quick to point out that it isn't the clients who suffer. Instead, she says, it is the families of the attorneys and the attorneys themselves. "We don't shortchange the client," she said. "What we shortchange is ourselves."

But a public defender will still need more time than a private attorney to prepare for a case.

"What it means for our clients is that if you've got a public defender, you're likely to wait longer to get to court than you would if you were able to go out and hire an attorney," she said.

But that's something she knows not everyone can do.

"So many things in this life are determined by how much money you have," she said. "Whether you lose your life (or a good portion of it) should not be one of those things."

The growing caseloads are a statewide problem, Howard said. Even though new funding was recently appropriated to hire 10 attorneys to reduce caseloads across the state, by the end of the fiscal year there was still an overall increase in the number of cases per attorney.

One office, in Hazard, had an average of 600 new cases per lawyer last fiscal year, and 16 offices averaged 500 new cases.

State Public Advocate Ernie Lewis said something must be done in a Department of Public Advocacy press release announcing the most recent data on caseloads, available at www.dpa.state.ky.us.

"We are approaching that point when our public defenders are simply unable to perform their essential task of defending the accused due to these crushing caseloads," he wrote. "The people of the commonwealth want to believe that the quality of justice provided an accused does not depend upon the money available to pay a lawyer. These caseloads threaten that fundamental belief."

Howard said she felt there would have to be legislative action to address the problem. "We need to recognize that every individual is entitled to have competent counsel," she said.

"If that's going to happen (competent counsel) it means that attorney has to have sufficient time to prepare for a case. And that means a sufficient number of counsel, with a caseload that's low enough to prepare. And that means there has to be adequate funding to reduce the caseload per attorney."

But for public defenders like Howard, who bypass the big bucks offered in defense or corporate law, money isn't their motivation. "What drives most of us to be public defenders is we know that not every person charged is guilty," Howard said. "And if they are guilty, not every person is guilty to the extent they are charged."

Somebody has to stand up for the people who don't have anybody else to stand up for them."

*Editor Dena Potter contributed to this report. Shawn Hopkins is a staff writer with the **Appalachian News Express**.* ■

THE IMPACT OF HIGH PUBLIC DEFENDER CASELOADS

Editor's Note: In upcoming editions, ***The Advocate*** *will feature stories illustrating the far reaching impact when public defenders have an excessive number of cases. The author in the first of these stories asked to remain anonymous.*

After my partner told me it was either the job or her, I quit my position as a trial public defender. I do not regret the decision, but I feel that I have unfinished business. When I quit, I was just getting to feel like I knew sort of what I was doing. I hate to think that about the clients who went to jail or prison on my watch that would have gone free but for my inexperience. There is a gnawing inside me that wants to go back to being a trial attorney and somehow make up for my rookie errors.

I am a post-trial public defender now. Although the job is taxing, sometimes to the extreme, I am better able to manage the workload because I do not have 125 open files in my office. I should note that my partner is not currently clamoring for my resignation. She puts up with the late nights and weekends because they are less frequent and because she knows well the person she decided to spend the rest of her life with and she knows that representing poor people is in my blood.

As a post-trial attorney, I watch a lot of videotape. I see young public defenders, like I once was, making the same mistakes I did. I also see that by the time some of my cases get to me, that many of these young public defenders are no longer public defenders. The turnover rate is high. I am sure my story about being given an ultimatum by a loved one is not an unusual one.

The sad reality of public defender work is that many young attorneys leave before they get the trial chops to adequately safeguard their clients rights. A truism of criminal law is that it is much easier to prevent unjust convictions than to undo them. I believe that because of me there are people in prison that are innocent. I fervently hope that there are not that many. I will never know for sure.

As I said before, I feel I have unfinished business. Although I love my current position, part of me envisions going back to trial work. Although I still learn new things everyday, I am just now starting to feel like my education is a full one, and part of me wants to bring this experience to bear at the trial level. However, I do not know if my experience can make the crush of a trial caseload manageable within the context of the life I need to live outside of my job.

* * * * * * *

Audrey Lee, Assistant Public Advocate, Paducah --

I go to the office on Saturdays and to the jail on Sundays. And that's just about the schedule everyone else keeps around here. You always have company on Saturdays with public defenders coming and going in the mornings or afternoons. Everyone is trying to get ahead or keep up with the paperwork or the new cases. And walk into the jail on Sunday afternoon and you'll probably be joined by another public defender who's reviewing video and audio tapes with a client in the corner. And if they're viewing videotapes, the public defender is using a VCR/TV combo purchased personally to be able to spend the time with the client going over all of the tapes. At least two attorneys in our office have those TV combos which they wheel around on carts.

I'll never forget the surprise in a client's voice when she found out that an attorney came to the jail on Sunday to visit her. I had been given the file late on Friday. I put a casserole in the oven and left home to go to the jail. I continued to meet with that client at odd hours according to her work schedule even after she bonded out of jail. I stood in front of the door the week before trial as she sat in my office crying and desperate to do anything after 15 months of this ordeal, even if it meant she would go to jail but her husband would stay free and be able to keep the kids. I told her I could win this case and she would get her kids back if only she'd let me take it to trial. My directing attorney came into the office and assured her that I could win this case. My Dad came to the first day of trial but not the second day. When the jury came back with a not guilty on the felony charges, my client's husband and also co-defendant, turned to me and said, "Tell your Dad, you done good."

Sundays get to be odd for public defenders. I'll never forget the Sunday that I was in the middle of prayer when an usher tapped me on the shoulder to say that I was needed outside. A man had been released from jail after being arrested the night before. He was a stranger to the city and had wandered to my church which is a block from the courthouse. He didn't know how to get his girlfriend released and how to get his car out of impound. My brother had come upon him

I'll never forget the surprise in a client's voice when she found out that an attorney came to the jail on Sunday to visit her. I had been given the file late on Friday.

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outside on the church steps and asked an usher to get me. I came out, heard his story and asked my brother to drive us to the jail. So I went into the jail on a Sunday, wearing my Sunday going to meeting hat and heels to ask the jailers about his situation. I came out, gave him the information and told him where to find a hotel to stay until he got his car out of impound. Then slipped back into my pew at church. On Tuesday, the Judge assigned us to his case and I got the file.

Another Sunday, the ushers urged me to come forward in church. I thought there was an emergency. No. One of my clients who had a particularly public case, was serenading me in front of the church. I had gotten her a probated sentence on a second in less than two years. On every fourth Sunday, the class D inmates come to my church for service and dinner. It's also a chance for them to see if they can get close enough to me to put requests in on their cases. It really gets to be time consuming sometimes. My dinner gets cold. My family urges me to skip those church dinners because it means that I'm not enjoying the fellowship but just working.

Our time sheets don't reflect the late hours, but someone is usually here until 8 or 9 every night. It catches up to you. My family always wants to know when I'm going to take a day off. And if I'm here at night, they want to make sure that I don't stay here alone but leave when everyone else leaves. I haven't worked as many weekends this year. For one, my doctor would not let me work extra hours when I returned to the office in January. I had gotten sick in December. Everyone knew something was wrong at court that day. I finished court with some difficulty. I went home and was taken to the hospital that night. Others had to cover for me even though some of them were sick too. One came into the office after losing her voice. She could do paperwork but could not do my pretrial conferences. So my last week at home, I sat on the phone in my nightgown and robe, calling prosecutors in two counties to work my cases and pass the information on to the defenders standing in for me in court. ■

DPA's 2004 Litigation Persuasion Institute

October 10-15, 2004, DPA held its 2004 Litigation Persuasion Institute in Faubush, Kentucky. DPA provided training for 60 attorneys and 30 investigators in the weeklong training.

Crisis Intervention Team Training: A New Approach

Jim Dailey
Director of Criminal Justice Training, NAMI

In June 2000, four Louisville Division of Police officers in Chickasaw Park in Louisville's West End shot to death a man who suffered from paranoid schizophrenia. While investigation revealed this incident to be a clear example of "suicide by cop," the public upheaval following this incident resulted in demands for a change to the "Use of Deadly Force Policy" and for more police officer training in how to deal with a person in psychiatric crisis. This led to the introduction of the Crisis Intervention Team (CIT) police training program to the Louisville Police Department. Jim Dailey and the National Alliance of the Mentally Ill (NAMI) Louisville advocated for this program with the Mayor and Chief of Police. Due to the public scrutiny this incident received, Greg Smith, Chief of the Louisville Division of Police sent his top staff to Memphis, TN to learn more about the program and how it might fit with operations in place in Louisville.

As a result of the on-site visit, the program was approved for implementation in Louisville and efforts began right away to accomplish that goal. A large factor in helping the police department arrive at this decision was the fact that Memphis PD experienced a 7-fold reduction in the number of officer injuries encountered in the process of bringing a person in psychiatric crisis into custody. The issue that was of greatest interest to NAMI was the fact that there was also a 52% reduction in the number of consumer injuries during the first two years of implementation in Memphis. These outcomes proved to be a win-win for all parties.

In Kentucky, police departments in eight cities have expressed interest in the CIT training program....

As to program outcomes, Louisville encountered 2,200 runs in 2002, the program's first year in operation. Of those runs, 1,960 people encountered were taken to treatment at the University of Louisville Hospital's Emergency Psychiatric Service Center. To further validate the value of the program's outcomes, review showed there was a 1,500-bed-day reduction in the number of people being housed in the Jefferson County Detention Center in 2002. During 2003, 92% of the people encountered by police in the CIT unit were taken to treatment, with less than 1% arrested, far less than the national average of 9%.

At NAMI's National convention in September 2004, an all-member resolution was approved making the Memphis Model CIT program the law enforcement training program sanctioned by NAMI as the best practices model it will hereafter support on a national basis, with support being provided to develop a consistent curriculum for the program and to encourage all NAMI's 1,100 local affiliates to utilize the model.

In Kentucky, police departments in eight cities have expressed interest in the CIT training program and NAMI Kentucky is actively assisting them in implementing it at this time. For further information, please contact Jim Dailey, Director of Criminal Justice Training at NAMI Kentucky, 502-245-5284 or 800-257-5081. jdailey@nami.org. ■

In an unpublished decision, the Kentucky Court of Appeals has held that payment for an indigent jail inmate's psychotropic medications is the responsibility of the local jail, not the state. In *David Osborne v. Commonwealth*, 2004 WL 1416502, the Court applied statutory construction rules in analyzing KRS 441.045(3) and KRS 441.047(1). It concluded that the statutes are not conflicting and that the jail must pay for psychotropic medications for indigent jail inmates. However, as this edition of *The Advocate* goes to press, the decision is not yet final; a motion for discretionary review is pending in the Kentucky Supreme Court.

Crisis Intervention Team: A Collaborative Effort in Frankfort

Kelley Gannon, LCSW

How we got started?

By late 2002 Louisville Division of Police had achieved success with their newly implemented model of crisis intervention for psychiatric emergencies. Given this success the National Alliance of the Mentally Ill (NAMI) of Kentucky began an exhaustive recruiting effort to get more police departments interested and involved. Jim Dailey of NAMI KY visited the Frankfort Police Department in late 2002 and without hesitation Chief Ted Evans and Major Mark Wilhoite committed to joining the initiative.

What is a Crisis Intervention Team (CIT)?

It is a collaborative effort of local police, community mental health centers and local hospital personnel working together to better serve persons in a psychiatric crisis. These community partners meet to develop mutually agreeable procedures for best serving the mentally ill respondent. Once partnerships and agreements are in place a training is presented by the local community mental health center. The focus of training is on increasing the knowledge and awareness of officers' abilities to recognizing a psychiatric crisis. Given that the officer is most likely to be the first on the scene involving the person in crisis, attention is then given to de-escalation techniques that guide the officer in protecting himself and the respondent. Additionally, protocols on the 202A statute that governs involuntary hospitalization are discussed. Once the training is completed the program is put into operation. The CIT continues to meet regularly for discussions about issues that arise and ways to improve the program.

How does it work in Frankfort?

In Frankfort we conducted our first training in January 2003. We trained a total of eleven patrol officers, almost a third of the patrol force. The community partners began to see immediate improvement with use of the new procedures. In the first year of operation the Frankfort Police Department received seventy two calls for service. A total of 33 were identified as mentally ill respondents and 54 were warrantless arrests. All 72 calls were evaluated by a Qualified Mental Health Professional (QMHP) for involuntary hospitalization. A total of 90 202A petitions were served by the local sheriffs department and then evaluated by a QMHP. Thus, in all, 162 persons were treated under the CIT protocol.

After a successful year, a second training was presented in May 2004. Given what we had learned over the preceding year other community partners were invited to attend. Emergency Medical Services and Dispatchers joined 9 officers in a 3 day training program. New procedures were developed and immediately implemented after the completion of the training. At this time the Frankfort Police Department has had half of their patrol force trained.

Each City is Different

Frankfort found a way to utilize the CIT model in a smaller town. We have accomplished many goals through this program. We have made better use of police officers time, improved community relationships, and better served a stigmatized population. CIT will look different in every city. However, Frankfort is a good example of a smaller county pulling its resources together and creating an effective team approach to an issue that reaches all facets of the community. ■

Kelley Gannon, LCSW
Service Area Manager
Bluegrass Regional MHMR Board, Inc.

Consensus Project Report

In January 2002, the Council of State Governments and representatives of mental health and criminal justice organizations released the Consensus Project Report. The Report is made "up [of] a compendium of ideas, recommendations, and innovative examples that have worked well in different places around the country and therefore should at least be considered for implementation in other communities. Collectively, they provide a comprehensive vision for the criminal justice and mental health systems' response to people with mental illness." The Report can be found on the Criminal Justice/Mental Health Consensus Project web page at http://consensusproject.org/the_report/.

THE PSYCHOLOGY OF LITIGATION
LEARNING DISABLED OR MENTALLY RETARDED?
IMPLICATIONS FOR THE RIGHTS WAIVER

Diana McCoy, Ph.D

There seems to be a tendency to confuse learning disability with mental retardation, with the former sometimes a tricky concept to get judges in suppression hearings to understand unless they have had personal experience with learning disability, such as with their child. A common line of cross-examination I encounter when I have diagnosed someone as so severely learning disabled that he cannot meaningfully waive his rights seems to more often than not place the emphasis on demonstrating that the defendant is not mentally retarded and therefore understands *Miranda*. This little obfuscation poses a danger that the concept of learning disability and its implications for knowingly, intelligently, and voluntarily waiving one's rights will be obscured.

Characteristics of learning disabled and mentally retarded individuals overlap to some extent in that they both pertain to cognitive deficits and involve being handicapped. There are important distinctions between the two, however, with expert testimony needing to be very specific as to the nature of the learning disability and how it impacts the ability to waive one's rights and make a statement.

Typical cross-examination goes like this:

Does it concern you, Doctor, that Mr. Smith made A's in school in some classes and graduated 244th in his high school class of 500?

No, because Mr. Smith is learning disabled, not mentally retarded, and so he is able to perform academically with the kind of assistance he in fact received throughout his academic career by virtue of having been classified as learning disabled. He is able to perform better in some classes than others. His difficulty is with central processing of language, especially problematic within the super-charged atmosphere of the interrogation room since stressful situations make comprehending and using language even harder for him. He sometimes fails to appreciate that some words have two meanings, *i.e.*, "waive" and "wave" and becomes easily confused. He has difficulty organizing his thoughts, misses nuances of speech, and is slow to understand what is being said because his listening skills are impaired. This made it very hard for him to understand and respond to the questions posed him by the interrogator.

Diana McCoy

It is understandable that he would have to have someone write his statement for him after becoming upset by his failure to process what was said to him during the interrogation. It is not surprising that he would sign the statement without reading it because he would not be able to make sense of it unless he read it over and over again, which he is not likely to do, given the circumstances. He would not comprehend the statement if it was read to him because he typically needs verbal data repeated several times due to his problem processing language. Family, friends, and co-workers who know Mr. Smith have all confirmed his slowness and all around obtuseness where language is concerned. This is amply documented by the extensive educational records in his file, which I have summarized in my report to the Court and in my earlier testimony.

Does it concern you, Doctor, that Mr Smith scored in the Average range on an intelligence test administered to him in high school?

No, because Mr. Smith is learning disabled, not mentally retarded, and intelligent people may have learning disabilities. He also scored in the Average range on the intelligence test I likewise administered to him, and the results of both tests, 9 years apart, are consistent with each other as well as with a diagnosis of learning disability. That is, there is a significant differential between the verbal and performance portions of the intelligence test, which is diagnostic of learning disability.

Learning disability is diagnosed when achievement on tests is below that expected for age, schooling, and intelligence, with learning problems significantly interfering with academic achievement. Mr. Smith first went to a psychologist for language delay at age 3, repeated kindergarten because of language problems, had speech and language services from kindergarten through high school as a result of a specific learning disabilty, was tutored throughout high school, and was admitted to the University of Tennessee under the aus-

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pices of their Disability Student Services, which allows him to have others take notes for him in lectures and extra time to complete exams in a separate room.

Does it concern you, Doctor, in view of your testimony that he could not knowingly, intelligently, and voluntarily waive his rights, that Mr. Smith earned a GPA of 2.39 while at the University of Tennessee, which is passing, and he is only 14 hours from graduating?

No, because Mr. Smith is learning disabled, not mentally retarded, and he is able to complete an academic course of study, including attending and even graduating from college when given assistance. However, in this case Mr. Smith was in college for almost 6 years and still did not complete his education despite the services offered for handicapped students. He finally gave up and dropped out of school.

Does it concern you, Doctor, that Mr. Smith is capable of living on his own, in his own apartment?

No, because Mr. Smith is learning disabled, not mentally retarded, and is able to live independently. He is nonetheless fairly naïve and childlike and historically it has been easy for others to exploit him. In fact, his parents learned that he went deeply into debt for this very reason, and he is still in the process of reimbursing them, his parents having taken control of his finances and paid off his debts. They have since become aware that he bought every sob story going, allowing others to live with him and keeping them up. At the day care center where he worked he routinely loaned his car to any of the mothers who asked and would baby sit for them on weekends at no charge. He is now back to living with his parents at age 34.

Doctor, are you telling this court that Mr. Smith is unable to make decisions or weigh his options?

Yes and no. He is certainly able to decide whether he wants chicken or steak for dinner and which channel to watch on TV tonight. However, when it comes to intelligently waiving his rights, that is, knowing what his options are and appreciating the consequences of his decisions, he has much greater difficulty. If he does not know his basic rights, for example, believing that once the interrogation starts he cannot stop or that if the officer continues to be angry with him for not answering questions the "right" way that he can jail him on the spot, than he can hardly make an intelligent decision on his own behalf regarding the rights waiver. Again, reading his rights or having them read followed by simply asking him if he understood does not ensure that this severely learning disabled young man comprehended them in view of his well-documented difficulty processing language, written or spoken.

An intelligent waiver involves the suspect appreciating the implications of the potential for self-incrimination during an interrogation in the absence of an attorney. The inability to quickly process verbal information received during the interrogation because of a language-based learning disability significantly impedes thinking through options and considering the consequences of any decision(s) as to whether it is prudent to answer the questions of the police without an attorney present.

Dr. McCoy is based in Knoxville. Visit her website at www.forensicpsychpages.com. ■

In *R.C. v. Commonwealth*, Ky.App., 101 S.W. 3rd 897 (2002), discretionary review denied April 17, 2003, the Court of Appeals held that a licensed clinical social worker was not qualified to express an opinion that a child had been sexually abused even though the Juvenile Code includes LCSWs as "qualified mental health professionals." Court of Appeals noted that the Judge must still make determination about whether witness is an expert under KRE 702 and admission of social worker's opinion in that case was still barred by previous case law.

DRUG SUMMIT REPORT COMPLETED

Ernie Lewis, Public Advocate

On August 23, 2004, Lieutenant Governor Pence presented the formal *Statewide Drug Control Assessment Summit 2004* to Governor Ernie Fletcher. This ends the process that began in February 2004 of assessing the problem of abuse in this Commonwealth. It begins a larger process of converting the Report into policy and programs and funding.

The Report is an important document for all criminal justice practitioners. It will influence public policy development in this Commonwealth for many years to come. One source of its importance lies in the process used to arrive at the assessment. While many of the usual suspects were included in the Summit, what can be described as a massive effort to be inclusive was undertaken. Over 3000 citizens attended one of the sixteen public meetings. Over 850 in-depth surveys were completed. The Justice and Public Safety Cabinet mostly through the Department of Criminal Justice Training devoted an immense amount of resources to make this effort as rich and meaningful as possible for all concerned.

There is a Shift from Being Tough to Being Effective

Setting policy in a state is not simple. Policy develops over time, is often supported by a number of different constituencies, and has its own reason for being. This Report demonstrates that a distinct policy shift is being undertaken.

This shift began with Governor Fletcher's State of the Commonwealth Address in January 2004. In that address the Governor stated: "We must move beyond just being tough on crime to be effective on crime, and that's not only for those caught in the jaws of addiction, but also for the taxpayer who foots the bill."

This speech by the Governor succinctly states the desired policy shift. In many ways it is at the core of the Drug Summit and the Report that followed.

There is an Equally Significant Shift from a Criminal Justice Model to a Health Model

It makes all the difference how a problem is perceived. In the past, substance abuse has been seen as a criminal justice problem. The thought was that if we declared a "War on Drugs" and invested money into law enforcement, prosecution, and incarceration, that we could win the war. Kentucky, as has virtually the entire nation, has engaged in this war. We have quadrupled the number of persons in our state's prisons. We have arrested and incarcerated many people, more by far than any nation on earth. We have been tough. But the numbers of persons addicted to illegal and legal substances has never been higher. Lives, families, and communities are being destroyed. And the prison-industrial complex grows ever larger, and takes an ever-increasing portion of our state's financial resources.

The Drug Summit marks a shift from the paradigm of a "War on Drugs." No one is abandoning law enforcement on this issue. Indeed, more money is being spent on law enforcement than ever before.

Rather, an effort is beginning to see the other dimensions of this problem. The Report notes that there is an "epidemic." That is not a criminal justice expression, but rather a public health term. It indicates that the lives of people, the physical and mental lives of our citizens, are declining because of the addiction to alcohol and controlled substances. That is a huge shift. What it means if followed to its logical conclusion is that we must begin to shift money from incarceration to treatment. What it also means is that if treatment really works, the crime rate will eventually drop, and the lives of individuals, families, and communities will improve.

Three Recommendations are to be Implemented Immediately

The Report is organized into three distinct sections. First, there are those action items that can be implemented immediately. Second, there are items that are recommended for consideration by the new Office of Drug Control Policy (ODCP). And third, there are items that were not considered sufficiently for a recommendation and that need further study.

There are three items that are recommended for immediate implementation:

- The establishment of an Office of Drug Control Policy. This Office, which has been placed in the Justice and Public Safety Cabinet, will report to the Lieutenant Governor and will be responsible for the coordination of substance abuse policy in the Commonwealth.
- The declaration that substance abuse should be treated as an epidemic. This is intended to elevate substance abuse in the mind of the public and to ensure that it has a high priority in policy discussions. It is also intended to be the consistent theme of the policy conversation.
- The creation of a Working Group that will have as its mission the transition from the Drug Summit to the Office

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of Drug Control Policy. This Working Group will include the Lieutenant Governor; a US Attorney; representatives of the following: Cabinet for Health Services, Department for Public Health, Department for Mental Health/Mental Retardation, the Justice Cabinet, the Kentucky State Police, the University of Kentucky, the Kentucky School Board Association, the Center for School Safety, the Commonwealth's Attorney's Association, and the Education Cabinet; and legislator representatives including the House Judiciary Chair, the Senate Judiciary Chair, the Senate Health and Welfare Chair, the Senate Education Committee Chair, and the House Education Committee Chair.

Nine Action items

There are nine items that were agreed upon by the Drug Summit, and are submitted as "under consideration for inclusion in policy and are reported as recommended by the Summit." These are the following:

- A Coordinated Prosecution Initiative. This will be coordinated through the Office of the Attorney General, is intended to support "over-burdened local prosecutors," and will bring "state resources to bear on a local level."
- Establish Standards for Enforcement Drug Task Forces. There are presently 11 Byrne funded Drug Task Forces, and two others operating in Eastern Kentucky (HIDTA and UNITE). The Report recommends that Task Forces found to be in non-compliance with established standards will be placed on a short-term commitment. The Report recommends that a model for state funded task forces should be created, with Operation UNITE serving as the "template for all awards, oversight and auditing criteria."
- Promote Treatment Services throughout the State. The universal finding throughout the state was that Kentucky needs more treatment, that it needs to be more widespread geographically, and that it needs to be provided more effectively.
- Correctional Treatment Works when available. The Report recommends that correctional treatment should be prioritized along with other treatment initiatives.
- Drug Courts are an effective component of coordinated policy.
- The Parole Board is an important element of substance abuse policy. Enhancing the role of the Parole Board in the substance abuse effort will require "significant revisions and updates to policies and procedures."
- Drug related Legislation.
- The best use of the Kentucky Agency for Substance Abuse Policy will be determined.
- Excise Tax on Cigarettes. The Report recommends an increase from $.03 to .09 with revenue going to the priorities of the Governor's substance abuse policy.

Six Items are Recommended for In-Depth Review by ODCP

These items include:

- Possible expansion of Drug Testing.
- Coordination of Kentucky Employee Assistance Program with ODCP to make them consistent.
- ODCP should track and collaborate Local Initiatives.
- Education/Prevention Findings targeted toward redirecting resources to substance abuse prevention.
- Exploration of Drug Forfeiture Monies as a way to fund substance abuse related programs.
- White Paper on Prevention.

Other Observations

Reading through the Report will cause the reader to understand the impressive effort that the Report represents. Some of what caught my eye from the Report is as follows:

- We have only 1% of the residential clinical treatment beds that are needed.
- Treatment is cost-effective. For every $1 spent on treatment, $4.16 in costs to the criminal justice system is avoided.
- The Report is packed with excellent recommendations on treatment. The treatment needs across the Commonwealth permeate the substance of the Drug Summit Report. Some of the recommendations on treatment include increasing funding for treatment by $15-20 million, making available core services within a 35 mile radius, establishing a 24 hour crisis and referral service statewide.
- Substance abuse treatment is available to only 19% of those leaving prison who need treatment. Worse, only 7% of those in the community on probation and parole in need of treatment have treatment available. This seems to me to be one of our biggest problems. At a minimum, those whose substance abuse problems have resulted in criminality should have the highest priority in terms of making treatment available. An additional concern I have is that there is little mention of the persons in jails being held on Class C or Class D felonies, or those serving misdemeanor time or awaiting trial who are in need of treatment. I believe that this represents a significant population that has unmet treatment needs.
- Drug Courts are affirmed in the Report. There are presently 59 counties without a drug court. There are only 10 juvenile drug courts.
- Changes suggested with the Parole Board are going to 2 person panels, and eliminating unnecessary face-to-face parole interviews. One intended outcome to the Parole Board recommendations is the "reduction of nonviolent drug offender population."
- Statements made in public by people who attended the Drug Summit are included in the Report. This is impressive, adding to the inclusive nature of this effort.

- I saw several references in the public comment section by public defenders indicating that there was a discriminatory aspect to treatment.
- I was impressed by the extent to which our public defenders participated in the Drug Summits.

Public Defenders Can Play a Larger Role

Public Defenders in Kentucky do not play a major role at present in attacking the problem of substance abuse. We know the problem well. Our role is confined to defending persons charged with substance abuse. We see the problems of addiction and how the disease is affecting the lives of our clients and their families. We try to identify places where treatment might help our clients as we put together sentencing plans. We argue for diversion, probation, and probation to an alternative sentencing plan, and often include treatment as a component to this effort. But, as with many things, resources have limited Kentucky public defenders.

The Department of Public Advocacy has tried on many occasions to play a more significant role in this effort. There were efforts in the early 1990s to obtain grant money to hire sentencing workers, and indeed some sentencing workers were hired. However, efforts to have sentencing workers in each public defender offices have failed for lack of funding. At present, DPA has two social workers and several sentencing workers who are remnants of the efforts from the early 1990s. DPA has recently requested the hiring of social workers for the purpose of making assessments of persons with substance abuse and creating a plan for treatment and other life changes. These efforts have also been rejected.

There is an opportunity for public defenders in Kentucky to play a more significant role. Defenders around the country have the following in place:

- Defenders in Seattle use masters level social workers to make chemical dependency assessments and present a report to the court detailing how their chemical dependency related to the criminal offense.
- The Connecticut Public Defender's Office hires 40 social workers who work in the different trial offices. These social workers make referrals to treatment programs as well as assessing housing, education, job skill, and other needs the client has. These workers make clinical assessments, obtain and analyze psychological, medical and social histories, provide counseling and crisis intervention to clients and their families, and assist homeless clients with housing needs. They intervene on substance issues with an in-depth assessment followed by the coordination of referral and placement within a treatment program.
- The Los Angeles Public Defender's Office uses social workers in their juvenile program. They have hired thirteen psychiatric social workers to conduct psycho-social assessments and develop individual treatment plans.
- In the Maricopa County Public Defender's Office they have 10 mitigation specialists in their trial division and 4 in their juvenile division who work with clients and their families in preparing client-centered recommendations and dispositions.
- The Knoxville Public Defender's Office hires 6 social workers who perform traditional social work services with clients and their families, addressing their substance abuse, housing, education, job skills needs. Good outcome measurements have resulted, with reduced recidivism.

Conclusion

I am hopeful. I have been a public defender for 27 years. I have participated in more than my share of revolving doors. I have seen young men with promising lives become addicted to awful substances and come back time and again after having served time in our prisons. I have had many conversations with similarly experienced judges, prosecutors and police officers who know that what we are doing now is not working. The Drug Summit Report appears to acknowledge that. It says we need a change in policy. It says we have an epidemic on our hands, and treatment and prevention and education are going to have to be included in our priorities alongside enforcement. And it says we need to fund all of this. There is room for hope here. ■

Defense attorneys can successfully practice in drug court without forgoing any of their ethical, legal or practical duties that they uphold in the traditional criminal court setting. Working as a member of a team does not mean that a defense attorney must subordinate his or her client's rights, and the attorney can remain true to his or her client's stated interests.

By being an integral member of the drug court team, helping to effectively operate the court at all stages, the defense attorney can help to promote therapeutic jurisprudence and assist his or her client in the road to recovery and subsequently, a better life without committing crime. Drug courts present a unique opportunity for defense attorneys and their clients, and properly implemented and operated, represent a successful shift in the treatment of drug addicted defendants in the criminal justice system

Critical Issues for Defense Attorneys in Drug Court Prepared by the National Drug Court Institute, the Education, Research and Scholarship Affiliate of the National Association of Drug Court Professionals, pg. 52, Copyright © 2003, National Drug Court Institute, http://www.ndci.org/CriticalIssues.pdf

Addressing Potential Conflicts of Interest in the Framework of Imputed Disqualification Within a Statewide Indigent Defense System

Rebecca Ballard DiLoreto

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This article discusses the law and the practice of cases that involve imputed disqualification particularly as it impacts a statewide public defender program from the perspective of the client, the attorney and the supervisor. All of those responsible for running a DPA trial office have had the experience of representing a client, a client's mother and father, son and daughter. DPA lawyers represent both the "Hatfields" and the "McCoys." Feuds running on for generations, multiple co-defendants, victims in one case becoming defendants and thereby clients in another, every one of these fact scenarios can raise the specter of imputed disqualification. In a subsequent article we will address how a full-time public defender system applies these principles to its assurance of vertical representation to clients as their cases move from trial to appeal and through post conviction. This article focuses primarily on those dilemmas as they impact conflicts arising with co-defendants and former clients.

Imputed Disqualification:

The American Bar Association has extensively examined the issue of imputed disqualification. Model Rule 1.10 speaks to this concept:

> (a)While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8 (c), 1.9 or 2.2.
> (b)When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
> *(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client*
> (2) any lawyer remaining in the firm has information protected by Rule 1.6 and1.9 (c) that is material to the matter
> (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7. ABA Model Rules of Professional Conduct, Rule 1.10 last amended in 1989.

Kentucky has codified this rule in Supreme Court Rule 3.130, Kentucky Rule of Professional Conduct 1.10. Kentucky has added subsection (d) to its rule which states:

> (d) A firm is not disqualified from representation of a client if the only basis for disqualification is representation of a former client by a lawyer presently associated with the firm, sufficient to cause that lawyer to be disqualified pursuant to Rule 1.9 and:
> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no specific part of the fee therefrom; and
> (2) written notice is given to the former client.

The Comment provides further explanation. "The rule of imputed disqualification gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. In such situations, a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, stated otherwise, each lawyer in the firm is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." Comment 6 to SCR 3.130, KRPC 1.10.

The principles of imputed disqualification must be applied in all courts and at all levels including juvenile court. *See Kentucky Bar Association Ethical Opinion - 238* (March 1981).

Is a Public Defender Organization a Law Firm for Purposes of Imputed Disqualification:

The inquiry required to determine if a public defender is disqualified from representation of a client by virtue of imputed representation, demands an analysis of the specific facts, the legal problem to be resolved for the client and ethical rules which impact the situation.

From a definitional perspective, the first "fact" we wrestle with is the question of whether or not a public defender office is a law firm. *SCR 3.130 (5.1)* recognizes that "a legal department of a government agency" is included within the definition of a "law firm." Yet *SCR 3.130(1.10)* Comment 3

speaks to a legal aid office where the clients are individuals rather than the government. "Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation." *See* Comment 3 to *SCR 3.130(1.10).*

In analyzing whether a public defender employee may negotiate for future employment with a prosecutorial entity, *KBA Ethics Opinion 407* addresses whether a public defender office is a law firm.

> A public advocate's situation can be analogized to a legal service organization…The determination of whether public advocates are to be treated as a firm for purposes of imputed disqualification must be fact specific. See S.C. Op. 96-22 (1996) (the South Carolina Committee noted that a 'public defender's office may be equated to a law firm,' but that the analysis would be fact specific); *Commonwealth v. Westbrook*, 400 A.2d 160 (Pa. 1979)(lawyers in same defender office treated as same firm); *People v. Spreitzer*, 525 N.E. 2d 30 (Ill. 1988) (not a firm); *Graves v. State*, 619 A.2d 123 (Md. Ct. App.. 1993) not treated as a single firm per se)…For example, in South Carolina Op. 93-01 (1993), a part-time public defender working in a public defender corporation was appointed to represent a post conviction relief applicant. The basis of the post conviction relief claim was the conduct of another public defender employed by the same corporation. In determining whether the public defenders should be treated as a firm for purposes of imputed disqualification, the South Carolina Committee stated: where separate offices are maintained by each public defender, there would not be a single public defender's office for purposes of imputing disqualification under Rule 1.10. *KBA E - 407*

Important Factors to Consider in Evaluating Conflicts of Interest in a Fulltime Statewide Public Defender System:

The available caselaw offers us important factors to consider relevant to the analysis of imputed disqualification in any given circumstance faced by DPA attorneys.

1. Access to Client Files:

"Where defenders in the same office discuss cases and have access to each other's files, Section 203(3) imputes their conflicts to each other. In the absence of such access, however, public defenders who are subject to a common supervisory structure within an organization ordinarily should be treated as independent for purposes of section 203(3). The lawyers provide legal services, not to the public defender office, but to individual defendants. Ordinarily, the office would have no reason to give one defendant more vigorous representation than other defendants whose interests are in conflict. Thus, while individual defendants should be represented by separate members of the defender's office, the representation of each defendant should not be imputed to other lawyers in an office where effective measures prevent communication of confidential client information between lawyers employed on behalf of individual defendants." The American Law Institute's *Restatement of the Law Governing Lawyers.*

2. Physical Separation of Offices:

Imputed disqualification should not apply where a system has two offices that are physically separate, have no access to each other's files and adhere to a well-known policy of keeping all legal activities completely separate. In this case the same public defender was in charge of both offices, his name appears on pleadings from both offices, but he is not responsible for supervising day to day operations of either office and may not initiate disciplinary or personnel actions. Most importantly, no financial incentive exists to please one client over the other because the county funds the offices, not the clients. Additionally, neither office solicits clients, nor do they accept referrals from the public. *People v. Christian*, 48 Cal. Rptr. 867, 874 (Cal.App. 1 Dist. 1996).

3. Are Attorneys Required to Practice Profession Side by Side Literally and Figuratively:

Appointment of one public defender to represent indigent criminal defendant who alleges ineffective assistance of counsel of another public defender creates conflict of interest; appointed counsel should not practice on day-to-day basis with lawyer against whom allegations of ineffective assistance of counsel are made. *Hill v. State* 566 S.W.2d 127 (Ark.,1978).

Attorneys employed by a public defender who are required to "practice their profession side by side, literally and figuratively" are members of a "firm" for purposes of this rule…[W]here the practice of each attorney is so separate from the other's that the interchange of confidential information can be avoided or where it is possible to create such a separation, there need be no relationship between them analogous to that of a law firm and there would be no inherent ethical bar to their representation of antagonistic interests" *Graves v. State*, 619 A.2d 123 (Md. App. 1993).

4. Do Entities Providing Representation Present Themselves to Public as Separate (Separate Offices, Separate Phone Lines, Separate Support Staff, Separate Letterhead, Separate Pleading Paper, Separate Computers, Separate Copiers and Fax Machines):

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Case-by-case approach should be used to analyze whether defendant represented by deputy public defender was denied effective assistance of counsel because of prejudicial conflict of interest; under such approach, trial court must conduct evidentiary hearing to: (1) determine whether attorneys employed by same public defender's office can be considered same as private attorneys associated in same law firm; (2) weigh factors relating to protection of confidential information by considering whether there were separate officers, facilities, and personnel; and (3) determine whether, as consequence of having access to confidential information, deputy public defender refrained from effectively representing defendant. *State v. Pitt*, 884 P.2d 1150 (Hawaii App.,1994). *Also see People v. Christian*, 48 Cal. Rptr. 867, 874 (Cal.App. 1 Dist. 1996).

5. Are There Separate Supervisory Structures for Day to Day Operations:

Illinois Office of State Appellate Defender's requested outside counsel to handle post conviction on cases wherein IOSAD attorneys had handled the appeal and where IAC on appeal was being raised. No conflict existed so long as IOSAD lawyers from a different office handled the post-conviction actions. Court balanced cost to county against ability to protect confidences and duty of loyalty. Court held that another IOSAD office could ethically represent clients. *People v. Black*, 507 N.E.2d 1237 (Ill.App. 5 Dist. 1987).

"Lawyers employed in the same unit of a legal services organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other should depend…on the specific facts of the situation." *Childress v. State*, 907 S.W.2d 718, 725-726 (Ark. 1995).

6. Are Offices Separated Geographically:

Two offices that are physically separate, have no access to each others' files and adhere to a well-known policy of keeping all legal activities completely separate. Same public defender in charge of both offices, his name appears on pleadings from both offices, but he is not responsible for supervising day to day operations of either office and may not initiate disciplinary or personnel actions. Most importantly, no financial incentive to please one client over the other because the county funds the offices, not the clients. Additionally, neither office solicits clients, nor do they accept referrals from the public. *People v. Christian*, 48 Cal. Rptr. 867, 874 (Cal.App. 1 Dist. 1996).

Case-by-case approach should be used to analyze whether defendant represented by deputy public defender was denied effective assistance of counsel because of prejudicial conflict of interest;....

Removal of the Federal Public Defender's Office as appointed counsel was not warranted by purported conflict of interest arising from another case involving defendant in Florida, considering that each Federal Public Defender's Office is a separate office, and conflict of interest on part of one would not disqualify other Federal Public Defenders. Removal of the Federal Public Defender's Office as defendant's appointed counsel was not warranted because of purported conflict of interest arising from another Federal Public Defender's representation of former cellmate who made offhand remark that he would cooperate against defendant, absent evidence that former cellmate had done so; moreover, attorneys involved made affirmative representations that there was no substantial possibility of conflict of interest. *U.S. v. Goldberg*, 937 F.Supp. 1121 (Middle District Pa. 1996).

7. Do Offices Share Investigators:

Multiple representation by public defenders does not in itself give rise to presumption of prejudice. However, assignment of co-defendants to outside counsel should be the norm. In New Jersey system, public defenders and contract counsel use common investigators. If outside counsel is unavailable, assignment to public defenders outside of county is next best option. If only option is to provide counsel to co-defendant within the office, then ensure that strict guidelines are in place to guarantee confidentiality and restrict access to individual files. *State v. Bell*, 446 A.2d 525, 527 (N.J. 1982).

8. Can the interchange of Confidential Information be Avoided:

No presumption arose that representation of co-defendants by lawyers from public defender's staff resulted in impermissible conflict of interest, where there was no showing of sharing of confidences or any evidence of strategy decisions being made in deference to other's interest. *Townsend v. State*, 533 N.E.2d 1215 (Ind. 1989).

No actual conflict of interest existed where defendant's counsel was member of same defense office which had represented cooperating witness government intended to use at trial and, thus, court was not obliged to disqualify defendant's counsel; counsel had no knowledge of any confidences shared between cooperating witness and other attorney in defense counsel's office, there was no reason to disbelieve

representations that effective "Chinese Wall" could and would be maintained between counsel and attorney who represented witness, and rational defendant could knowingly and intelligently desire counsel's representation under circumstances. *U.S. v. Lech*, 895 F.Supp. 586 (S.D.N.Y. 1995).

9. Published Policy of Keeping Files and All Legal Activities Confidential and Separate:

DPA Policy No. 14.00 Responsibility for Legal and Ethical Confidentiality addresses our obligation to keep all client material in a confidential and secure location and for all staff to maintain client confidentialities.

Maricopa County Public Defender's Office v. Superior Court In and For County of Maricopa, 927 P.2d 822 (Ariz.App. Div. 1 1996) involves a conflict of interest between a public defender's duty to zealously represent a current client, the defendant, and its duty of loyalty to a former client, an adverse witness. The attorney involved followed the public defender's policies concerning former clients as witnesses. The appellate court found that the trial court's denial of defense counsel's motion to withdraw was an abuse of discretion since counsel made a timely showing of facts establishing an apparent conflict of interest. Counsel complied with the public defender's conflicts policy, demonstrated an understanding of the applicable rules and cases, and presented by avowal the evidence necessary to establish an ethical conflict requiring withdrawal. The appellate court held that great weight should be given by the trial court to counsel's representation that a conflict exists, especially in a case where counsel has been appointed by the court.

10. Written Knowing, Informed and Voluntary Waiver Signed by Client

Capital murder defendant failed to establish that alleged conflict of interest adversely affected performance of attorney appointed to represent him from public defender's office, even though that office had previously represented two prosecution witnesses in unrelated matters, where defendant agreed to continue with his attorney after expressly being advised that public defender's office, but neither of his personal attorneys, had represented these witnesses. *Matter of Pirtle*, 965 P.2d 593 (Wash.,1998).

Factors of Particular Significance in Management of Kentucky's Statewide Public Defender System

It may be helpful to apply the following checklist when the question of imputed disqualification arises in a public defender office:

- Are attorneys supervised by same or different supervisors
- If same supervisor, has another supervisor been named to oversee assistance with case review
- Are guidelines/policies/directives in place to ensure no exchange of confidential information
- Are client files kept in secure location inaccessible to attorneys who possess conflict of interest
- Is same investigator assigned to both cases
- Is separate secretarial support provided to protect client confidences from exposure by attorney who has conflict of interest
- In conflict situation involving co-defendants or defendant who becomes witness or victim in another case, are public defender resources being allotted in equitable manner with NO favoring of one co-defendant over another or No favoring of defendant in one case over defendant in another who is witness in other case.
- Does opportunity exist for neutral party to evaluate client complaint if client believes ethics screen unsatisfactory
- Has a written waiver been obtained to ensure that client possesses understanding sufficient to raise any issues of concern with court or supervisor of work unit

Conflicts of Interest Viewed Within the Context of Client-Centered Lawyering:

"A conflict of interest is involved if there is a **substantial risk** that the lawyer's **representation** of the client would be **materially and adversely** affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client or a third person." *Restatement of the Law Governing Lawyers*, Section 121.

On the one hand we recognize our duty of loyalty to our individual clients. "The centerpiece of the multiple representation analysis is the lawyer's duty of loyalty to his client. A public defender's judgment, strategy, and candor with his client cannot be restrained by concern for another client, the defender's own interest, or the welfare of his coworkers." Nancy Shaw in "Representing Codefendants Out of the Same Office" in *Ethical Problems Facing the Criminal Defense Lawyer* [Rodney Uphoff ed.].

On the other hand, we know that personal obligations, a lengthy docket of clients, or concern for our co-workers do impact our ability to meet our client's needs. Some experts suggest an alternative approach that takes into account these competing realities. "The law of lawyering must focus on identifying conflicts of interest in a realistic manner, and regulate them in such a way as to avoid infringing on the effective representation of clients, where elimination of the conflict is not practical." Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering*, 10-4, Aspen Law and Business (2002).

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Evaluating the Conflict Beginning with an Analysis of the Llegal Problem" to be Dolved for the Client:

In the mid-1990s, legal ethicists, began to define the source of ethical dilemmas in the law as the gap in experience between the attorney and the client. What the lawyer may define as the "legal problem" s/he is to solve for the client may not at all be the problem as defined by the client. Conflicts of interest issues require an analysis of whether or not divided loyalties impact an issue material to the client's case. Thus, it becomes critical to correctly identify what "legal problem" the attorney is charged with resolving or helping to resolve. *See* Katherine Hunt Federle, "The Ethics of Empowerment: Rethinking the Role of Lawyers In Interviewing and Counseling the Child Client" in 64 *Fordham Law Review* 1655 (March 1996).

Empowering the Client to Identify the Problem to Be Solved and The Resolution of a Conflict of Interest:

Critical to the empowerment of the client is the lawyer's effort to communicate any potential or actual conflicts of interest that the client should consider in assessing the risk of harm to his case and in evaluating whether and how to assert his or her own interests. Such assertions of interests may occur as the client and the attorney define the boundaries and purpose of their professional relationship or they may occur in the courtroom, when the client has been sufficiently empowered to be able to present her or his concerns about the issue of divided loyalties to the court. Only solid listening and communication skills exercised by the attorney can ensure that the client is sufficiently empowered to make a decision regarding the client's perception of the risk of harm to her or him from the potential or actual conflict of interest. "Postmodern theorists have suggested bridging the gap between the "self" of the attorney and the "other" of the impoverished client by urging attorneys to listen to their clients' stories more closely and adopt a client-centered agenda." Janet A. Chaplan, "Youth Perspectives On Lawyers Ethics: A Report on Seven Interviews," in 64 *Fordham Law Review* 1763 (March 1996). This approach is as valuable in the area of helping the client understand issues surrounding conflicts of interest as it is in any other dimension of the representation.

Examining the Adverse Effect of the *Conflict* on the Representation:

Other scholars analyzing the question have asserted that we should no longer think in terms of actual versus potential conflicts of interest. Nor should we think in terms of results. Rather, the question is what effect does the conflict have on the quality of the representation as it is proceeding. A substantial risk is one that is significant and plausible. The likelihood of a clash of interests can be reduced in advance if lawyer and client agree from the beginning on the scope of

As lawyers who have a duty to advocate for and appropriately advise and counsel our clients, the rules on conflicts of interest are designed to ensure that we provide sufficiently zealous and competent representation.

the instant representation. This contextual analysis examines adversity, materiality and substantiality by a reasonable lawyer standard: based on the facts and circumstances that the lawyer knew or should have known at the time of undertaking or continuing the representation, was there a conflict?

Using the Adverse Effect Inquiry a lawyer must ask herself, what steps can the lawyer take to satisfy all of the legitimate interests that compete for attention in a given matter? The following specific questions can be helpful to a resolution:

(1) What kind of effect is prohibited?
(2) Is the effect significant enough to raise a conflict of interest?
(3) What probability must there be that the effect will occur?
(4) What conclusions do we reach when we examine the situation from the point of view of the client, the lawyer, other clients, other stakeholders in the system?

CONCLUSION

As lawyers who have a duty to advocate for and appropriately advise and counsel our clients, the rules on conflicts of interest are designed to ensure that we provide sufficiently zealous and competent representation. The day to day practice of law demands resolution of competing interests. We have a duty of loyalty to our clients, a duty of loyalty to ourselves and our families, financial interests and obligations, commitment to associates. The list goes on and on. In an indigent defense system, we are faced with the realities of finite dollars with which to provide representation to an extensive and important constituency. Consequently, when situations arise which may or unquestionably do threaten our loyalties to our client or our ability to ensure that all confidential communications remain sufficiently protected, our analysis of those situations must take into account what alternatives are available to our client. There are some situations wherein ethical screens can clearly protect our client's interests while continuing to ensure the highest quality of representation available. There are other situations mandating that we move further outside the normal construct to provide counsel or if alternatives seem unavailable, where we place the decision and the burden on the court to locate ethical and feasible alternatives. It is critical that we do all we can as advocates to resolve these conflicts of interest in a manner that reduces the risk of harm to our clients and protects their legal rights. ■

ADVOCACY FOR YOUTH: BROADENING OUR PERSPECTIVE

REFLECTIONS ON THE APPLICATION OF *FELLERS V. UNITED STATES* THE 6TH AMENDMENT RIGHT TO COUNSEL, AND THE QUESTIONING OF YOUTH IN KENTUCKY

Robert E. Stephens, Jr.

On January 26, 2004, the United States Supreme Court handed down a brief opinion in the case of *Fellers v. United States* 124 S.Ct. 1019 (2004). Following *Massiah v. United States* 377 U.S. 201, 206, the Court reaffirmed a defendant's 6th Amendment right, separate and distinct from *Miranda*, "when there [is] used against him at his trial…his own incriminating words, which federal agents…deliberately elicited from him after he had been indicted and in the absence of his counsel." (Brackets and omissions in *Fellers* opinion, quoting *Massiah*, above).

The Court reversed and remanded the case without deciding (the 8th Circuit having not yet addressed the issue) whether a knowing and voluntary waiver of one's right to counsel could be made after earlier police questioning violating the petitioner's 6th Amendment rights, or whether a "fruit of the poisonous tree" analysis applied. In the context of this article, however, the question sent back to the 8th Circuit is not as relevant as is the unanimous Court's (a sad rarity these days) strong affirmation of a 6th Amendment right to counsel upon formal charging of an alleged crime by the government. This strong affirmation of a 6th Amendment right to counsel is especially important for Kentucky juvenile court practitioners. Kentucky has recognized, by caselaw and statute, an unwaivable (at least during initial court appearance and entry of plea) right to counsel for juveniles. The decision in *Fellers*, which is essentially *Massiah* unanimously reaffirmed, cannot but effect the questioning of children in Kentucky.

Kentucky law mandates that a juvenile charged with an offense which could result in detention time (*i.e.*: "time in the pokie"), must have an attorney before the child can even plead guilty or not guilty. KRS 610.060 (2)(a) and *D.R. v. Commonwealth*, Ky. App. 64 S.W.3d 292 (2001). This standard's faithful adherence has resulted in a dramatic increase in the number of cases covered by the public defender.

When we look at KRS 610.060 (2)(a) in light of the *Fellers* decision, we come to certain conclusions regarding questioning of juveniles in Kentucky without counsel or a proper waiver of counsel, distinct from a *Miranda* style, Fifth Amendment analysis.[1] The Commonwealth of Kentucky has determined that youth cannot make the decision of how to plead at arraignment without counsel; how much more vigilant must we be, in light of *Fellers*, to uphold the right of formally charged juveniles to counsel before governmental questioning can occur. Indeed, because of our mandatory counsel statute, the right to counsel before questioning in Kentucky cannot be waived by juveniles.[2]

Miranda governs the questioning of a juvenile in Kentucky before formal charges are brought. Once formal charges are brought, the child cannot consent under any circumstances to speak to police without counsel's prior knowledge and opportunity to advise. Thus, once the court designated worker has taken a complaint, questioning by the government cannot occur absent advice of counsel. Such interviews must be suppressed absent advice of counsel before the interview.

It must be noted, that this means any questioning: an "interrogation" need not take place, nor must the child be in "custody", to trigger the *Fellers* reasoning, because the 6th Amendment stands alone and in addition to any Fifth Amendment *Miranda* inquiry. Rather, government agents need only have "deliberately elicited" information from the child to create a 6th Amendment violation. *Fellers*, at 1023.

What constitutes deliberate elicitation? In *United States v. Henry*, 447 U.S. 264, 270 (1980), the Court considered the fact that a paid informant/fellow inmate, acting under government instruction, spoke to Henry without his counsel's knowledge while the defendant was incarcerated. In *Massiah* itself, a codefendant's post-indictment, radio transmitted conversations constituted deliberate elicitation. How, then, can one escape the conclusion that a police officer, government informant, judge, social worker, or any other government agent questioning a child without counsel after charges have been brought violates the *Massiah/Fellers* pronouncement?

Though certainly not a part of the Court's opinion, we can look to the argument of counsel in *Fellers* to help explain the Court's decision, and to close our discussion with counsel's eloquent description of the right expounded in *Fellers*. As counsel for the petitioner explained to the Court in oral argument, the right protected by the 6th Amendment as in *Fellers* is distinct from that protected by the Fifth Amendment and *Miranda*.

[T]he right here is not coercion. The right here is not just addressed at police. It's addressed at the prosecution. And there is a difference. You may call it technical, but it is in fact

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the hallmark of our adversary system that once the Government decides to invoke a formal adversary process, it proceeds on the supposition that each side deals with each other, A, at arm's length, and B, assisted by the advice of counsel, who will prevent each side, and in [sic] particularly the defendant … from conviction resulting from his own ignorance of his legal and constitutional rights, and that's what's being protected.

Oral Argument, December 10, 2003, *Fellers v. United States*, transcript available at 2003 WL 22992278, page 3.

Youth in Kentucky, especially in light of the Commonwealth's mandatory counsel provisions, deserve at least the protection of the right to counsel reaffirmed in *Fellers*; indeed, as they are our future, they deserve more.

Robert E. Stephens, Jr. is a former public defender and is currently an Assistant Commonwealth Attorney.

Endnotes:

1. Please see the excellent article on raising issues of competency to waive *Miranda* rights in "Psychological Evaluations and the Competency to Waive Miranda Rights," I. Bruce Frumkin and Alfredo Garcia, *The Champion*, November 2003.
2. The bizarre exception being if a child was appointed counsel, spoke to her attorney, and then agreed to waive counsel's presence during questioning. ■

Juvenile Case Law

Challenge to Curfew Statute in Indiana

Nighttime curfew violates First Amendment: An Indiana state statute that imposes a nighttime curfew on minors violates the First Amendment's free speech clause despite the law's inclusion of an affirmative defense for express activities. Minors have First Amendment rights to be balanced against state interests. The Seventh Circuit held that in absence of express obligation on officer to investigate application of affirmative defense before making arrest, the curfew statute violates First Amendment. *Hodgkins v. Peterson*, 7th Cir 1/22/04.

Scioto Ohio Juvenile Correctional Facility

Complaints Involving Girls Treatment Facility in Ohio: In Kentucky, strong advocacy by DPA attorneys led a newly framed Justice Cabinet and Department of Juvenile Justice to address some longstanding criticisms by DPA JPDB staff concerning the care of girls at Morehead Treatment center. Similar complaints have been brought against a girls' facility in Ohio. Two independent investigations are going on at the Ohio Department of Youth Services Scioto Juvenile Correctional Facility, north of Columbus. Allegations include sexual assaults, beatings and improper medical care. Initially, the complaints were brought by the juvenile division of the Ohio public defender's office. Those complaints brought no action. The Children's Law Center of Kentucky wrote a letter of complaint and the Department of Youth Services took action. The Department hired a nationally recognized expert, Fred Cohen, from Arizona. His findings and recommendations should impact how we assess conditions issues for youth in the region.

Three Reports Published Summer 2004

Federal Report: *Incarceration of Youth Who are Waiting for Community Mental Health Services in the United States*, United States House of Representatives Committee on Government Reform - Minority Staff Special Investigations Division, July 2004

This report assessed every juvenile detention facility in the U.S. to determine what happens to youth when community mental health services are not readily available. 500 facilities in 49 states responded, representing ¾ of all facilities.

The following significant findings were made:

1) 2/3 of all juvenile detention facilities hold youth who are waiting for community mental health treatment
2) Over a 6 month period nearly 15,000 incarcerated youth waited for community mental health services
3) 2/3 of juvenile detention facilities that hold youth waiting for community mental health services report that some of these youth have attempted suicide or attacked others.
4) Juvenile detention facilities spend an estimated $100 million each year to house youth who are waiting for community mental health services.
5) The General Accounting Office reported that at least 12,700 families relinquished custody of their children to the child welfare or juvenile justice systems so that their children could receive mental health services.

Evaluation of Five State Supported Delinquency Prevention Projects: A research grant report published by the Department of Correctional and Juvenile Justice Studies at Eastern Kentucky University evaluated following prevention programs: the Camps Program, Family Nurturing Center of Northern Kentucky; Club Farley in McCracken County; Project Aspire in Henderson, Kentucky; WES House associated with the Genesis United Methodist Church in Jefferson County; and The Destiny Center at Sign of the Dove Church in Hardin County. The study found that three of the programs evaluated were successful in reducing delinquency behavior for involved youth. These successful programs ensured that the youth maintained high levels of attachments to their schools and experienced reduced alienation from their communities. Maintaining these ties allowed for successful reintegration. Of the risk factors targeted by the programs, two were found to be significant predictors of delinquency among clients: 1) youth's ability to respond appropriately to anger; and 2) academic achievement. *Lessons from an Evaluation of Five State Supported Delinquency Prevention Projects* published by Kentucky Justice Research Bulletin Justice and Safety Research Center Vol 6, Issue 2, May 2004. by Preston Elrod Ph.D.

Second Statewide Study of Disproportionate Minority Confinement: In July 2004, three University of Louisville professors issued a draft report on Minority Overrepresentation and Disproportionate Minority Confinement in Kentucky. The report offers an analysis of the "Perceptions of Bias of Juvenile Justice Officials Employed With Various [Juvenile Justice] Agencies." This report will be finalized and published before December 2004. The findings of Professors Talley, Rajack-Talley and Austin may help us unravel how we can best remedy the overrepresentation of youth of color in Kentucky's juvenile justice system.

CAPITAL CASE REVIEW

David M. Barron

U.S. SUPREME COURT

***Tennard v. Dretke*,**
124 S.Ct. 2562 (June 24, 2004)

(O'Connor for the Court; Rehnquist, Scalia, and Thomas dissenting)

(*Certificate of Applealability should issue on whether Texas' two question sentencing scheme fails to provide jurors with a vehicle to give effect to mitigating evidence of a low IQ*).

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court held that Texas' two questions for determining whether to impose a death sentence (whether the defendant caused death deliberately and with reasonable expectation that death would result, and whether the defendant would commit criminal acts that would constitute a continuing threat to society) provided a constitutionally inadequate vehicle for jurors to consider and give effect to the mitigating evidence of mental retardation and childhood abuse. *Tennard* deals with whether a certificate of appealability should issue on whether the same capital sentencing scheme was inadequate for jurors to give effect to evidence of low intelligence.

Fifth Circuit's improper analysis: The Fifth Circuit addressed *Penry* claims by making a threshold inquiry into whether the petitioner presented "constitutionally relevant" mitigating evidence, which is evidence of a "uniquely severe permanent handicap with which the defendant was burdened through no fault of his own," and evidence that "the criminal act was attributable to this severe permanent condition." Applying this test, the court denied a COA, holding that "evidence of low IQ alone does not constitute a uniquely severe condition," and "that even if Tennard's evidence was mental retardation evidence, his claim must fail because he did not show that the crime he committed was attributable to his low IQ."

When a COA should issue: "A COA should issue if the applicant has made a substantial showing of the denial of a constitutional right," which requires the petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." But, relief can only be granted if "the state court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 2254(d)(1).

A COA should have been issued: The Fifth Circuit's test is inconsistent with the principle that virtually no limits can be placed on the relevant mitigating evidence a capital defendant introduce. "Most obviously, the test will screen out any positive aspect of a defendant's character because good character traits are neither 'handicaps' nor typically traits to which criminal activity is "attributable." The question should have been "whether the evidence is of such a character that it might serve as a basis for a sentence less than death." Furthermore, the Fifth Circuit's ruling that low IQ evidence is not relevant mitigating evidence is clearly erroneous. Nothing in *Atkins* "suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the 8th Amendment prohibition on executing her is triggered." Rather, "impaired intellectual functioning is inherently mitigating," and "obviously evidence that might serve as a basis for a sentence less than death." Accordingly, because "reasonable jurists would find debatable or wrong the [lower court's] disposition of Tennard's low IQ based *Penry* claim, a COA should issue.

Justice Rehnquist dissenting: Low intelligence does not necessarily create the two edge sword of increasing the likelihood that the jury would find the defendant to be a future danger, and therefore, the jury was able to do what the constitution requires, give some effect to the mitigating evidence through the special issues.

Justice Scalia and Thomas dissenting separately: Because unchanneled discretion cannot be reconciled with the *Furman* principle that death penalty schemes be narrowly tailored to avoid the arbitrary infliction of death, the *Lockett* Doctrine, permitting the introduction of a wide range of mitigating evidence, commands no *stare decisis* and should be overruled.

***Schiro v. Summerlin*,**
124 S.Ct. 2519 (Jun. 24, 2004)

(Scalia for the Court; Breyer, joined by, Stevens, Souter, and Ginsburg dissenting)

(Ring v. Arizona is not retroactive)

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court held that "a sentencing judge sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty." *Summerlin*, a pre-AEDPA case, deals with whether *Ring* should be applied retroactively to cases that had already become final under *Teague v. Lane*, 489 U.S. 288

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(1989). A decision becomes final when direct appeal proceedings reach a conclusion by either the denial of *certiorari* on direct appeal or when the statute of limitations for filing a petition for a *writ of certiorari* has expired. Under *Teague*, new rules are applied retroactively to a case on collateral review only when the rule is either 1) substantive, or 2) a "watershed" rule of criminal procedure.

Ring is not substantive: Substantive rules of criminal procedure "include decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." These "rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Ring* is not such a rule because it relies entirely on the 6th Amendment, which has nothing to do with the range of conduct a State may criminalize. . . . The range of conduct punished by death [] was the same before *Ring* as after." Thus, there is a difference between making a certain fact essential to the death penalty, which is substantive, and requiring the jury to find that fact. The latter, which *Ring* requires, is procedural because it "allocates decisionmaking authority."

Ring is not a "watershed" rule of criminal procedure: A "watershed" rule of criminal procedure is a rule that "without which the likelihood of an accurate conviction is seriously diminished," an extremely narrow class for which no new rule has yet to fulfill. In determining whether a new rule is a "watershed" rule, the focus must be on whether "there is an 'impermissibly large risk' of punishing conduct the law does not reach." Because many reasonable minds disagree over whether juries are better factfinders and because the 6th Amendment jury trial right was not retroactively applied to the states, judicial factfinding does not diminish the accuracy of a conviction seriously enough to make *Ring* a watershed rule of criminal procedure.

Breyer's dissent (***Teague should not apply in capital cases***): Breyer dissents on the grounds that "the 8th Amendment demands the use of a jury in capital sentencing because a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution, and a jury is significantly more likely than the judge to 'express the conscience of the community on the ultimate question of life or death.'" Breyer also argues that *Teague* should be overruled when it comes to capital cases because 1) "a death sentence is different in that it seems to be, and it is, an entirely future event – an event not yet undergone by [the] prisoner" and, 2) ordinary finality interests should be valued less when life is on the line, particularly since collateral proceedings in death penalty cases may carry on for many years.[1]

***Beard v. Banks*,**
124 S.Ct. 2504 (June 24, 2004)

(Thomas for the Court; Stevens, Souter, Ginsburg, and Breyer dissenting)

(Mills v. Maryland is not retroactive)

In *Mills v. Maryland*, 486 U.S. 367 (1988), the Court held that a capital sentencing scheme cannot require juries to disregard mitigating factors not found unanimously. *Banks* deals with whether *Mills* should be applied retroactively to cases that had already become final under *Teague v. Lane*, 489 U.S. 288 (1989). The court first elaborates on the meaning of *Teague*, then lays out the requisite analysis under *Teague* for analyzing whether a rule applies to cases on collateral rule, and finally holds that *Mills* is a new rule that does not fall within the exceptions to *Teague*.

The meaning of *Teague*: "*Teague's* nonretroactivity principle acts as a limitation on the power of federal courts to grant habeas relief to state prisoners. That is why federal habeas corpus courts must apply *Teague* before the considering the merits of a claim, whenever the State raises [Teague]." Thus, *Teague* "protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts." Consequently, a court's practice of declining to apply waiver principles in capital cases not render cases non-final for *Teague* purposes.

The *Teague* analysis: "Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral rule involves a three-step process:" 1) "the court must determine when the defendant's conviction became final;" 2) the court "must ascertain the legal landscape as it then existed, and ask whether the Constitution as interpreted by the precedent then existing, compels the rule" (*i.e.* is the rule new); and, 3) "if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity," — rules forbidding punishment of certain conduct or "prohibiting a certain category of punishment for a class of defendants because of their status or offense," and "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."

Mills is not a "watershed" rule: In order to be a "watershed" rule of criminal procedure, the rule must have the "primacy and centrality" of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (granting defendants the right to counsel). *Mills* is not such a case. It applies narrowly and "works no fundamental shift in [the] understanding of the bedrock procedural elements," even though it "removes some remote possibility of arbitrary infliction of the death sentence."

***Mills* is a "new" rule:** The reasonable jurist test, an objective test for which the presence of actual disagreement among

jurists does not conclusively establish a rule's novelty, proves that *Mills* is a "new" rule. Each case relied on in *Mills* considered only obstructions to the sentencer's ability to consider mitigating evidence. Thus, as the 4 dissenting justices in *Mills* pointed out, *Mills* represents a shift in focus from the *Lockett* requirement that the defendant must be allowed to present any evidence about the character or record of the defendant or the circumstances of the offense that mitigate towards a lesser punishment to a focus on the individual juror. Because reasonable jurists (such as the dissenting justices in *Mills*) differed as to whether *Lockett* compelled *Mills*, particularly since Mills governs how the sentencer considers evidence not what evidence it considers, Mills is a new rule of criminal procedure.

Stevens dissenting (joined by Souter, Ginsburg, and Breyer): *Mills* is not a "new" rule because it represents a straightforward application of the principle that the 8th and 14th Amendment prevents sentencing schemes that allow the death penalty to be wantonly and freakishly imposed. This bedrock principle is violated when a system allows one vote in favor of death to outweigh 11 in favor of life.

Souter dissenting (joined by Ginsburg): Equating the reasonable jurist test with *Teague* "gives too much importance to the finality of capital sentences and not enough to their accuracy."

SIXTH CIRCUIT COURT OF APPEALS

***Workman v. Bell*,**
Nos. 04-6037/6038 (6th Cir. Sept. 20, 2004)

Affirming stay of execution granted by the federal district court pending the Sixth Circuit's ruling in *Abdur'Rahman v. Bell*, which will decide whether all 60(b) motions filed by a criminal defendant should be treated as a habeas petition.[2]

***Hicks v. Collins*,**
2004 WL 2049966 (6th Cir. Sept. 15, 2004)[3] (death sentenced affirmed)

Standard of review: Because this was a pre-AEDPA case, the court reviewed the district court's refusal to grant a writ of habeas corpus de novo, but reviewed the district court's factual findings for clear error.

IAC of appellate counsel is procedurally defaulted: A four part test is used to determine whether a claim is procedurally defaulted: 1) the court must determine that there is a state procedural rule with which the petitioner failed to comply; 2) the court must determine whether the state courts actually enforced that state procedural rule; 3) the state procedural rule must have been an adequate and independent state procedural ground upon which the state could rely to foreclose review of a federal constitutional claim; and, 4) if the court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that the there was cause for his failure to follow the rule and that actual prejudice resulted from the alleged constitutional error. Under this test, Petitioner's IAC of appellate claim is found to be defaulted. Ohio law bars IAC of trial counsel claims not asserted on direct appeal only when the defendant is represented by different counsel. Because Petitioner had the same counsel on direct appeal, his IAC at trial claims are not defaulted, but his IAC claims of appellate counsel are defaulted because Petitioner failed to comply with Ohio law requiring that IAC of appellate counsel claims be raised in a motion to reconsider the direct appeal.[4]

Improper prosecutorial argument was not fundamentally unfair: In determining whether a prosecutor's statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process," a court looks to four factors: 1) the likelihood that the remarks would mislead the jury or prejudice the accused; 2) whether the remarks were isolated or extensive; 3) whether the remarks were deliberately or accidentally presented to the jury; and 4) whether other evidence against the defendant was substantial. Under this standard, none of the prosecutor's comments requires reversal.

Message to community argument: The comments that "it is time you sent a message to the community" and "the people in the community have the right to expect that you will do your duty" were not calculated to incite the passions and prejudices of the jurors and arguably were proper references to the need to punish guilty people.

Prosecution Reviewing all mitigating factors listed in statute including ones not raised at trial: Although this is improper because it impermissibly focused attention on the absence of mitigating factors, Petitioner suffered no prejudice because there is no reasonable probability that the error effected the outcome in light of the nature of the crimes, the lack of mitigating factors, and the overwhelming balance of valid aggravating factors.

Caldwell argument and religious references: Because a juror "should not feel less responsible, or more free to err, because of a belief that its decision to impose death will not have effect unless others later confirm the decision," it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriate sentence rests elsewhere. Casting the jury's decision as a "recommendation" does not violate this rule because it is not an inaccurate statement of Ohio law, which requires a separate post-recommendation finding by the trial judge. Similarly, identifying Petitioner, people of Ohio for authorizing the death penalty, and "fate, God, a deity or something who has determined that there will be a just punishment for

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this man," as the being responsible for a death sentence does not improperly shift the jury's responsibility. Although the "God" comment is problematic on separate religious grounds, each of these statements were isolated comments that were not likely to cause the jury to feel a diminished sentencing responsibility, particularly in light of the court instructing the jury that counsel's argument is not evidence.

Failure to introduce mitigating evidence of Petitioner's childhood abuse: Trial counsel was not ineffective for failing to introduce mitigating evidence and for not calling some sort of expert instead of relying on the testimony of Petitioner's mother and six former co-workers. This is for two reasons: 1) Petitioner was uncooperative and never communicated any history of abuse to his counsel; and, 2) the evidence that Petitioner engaged in homosexual activity would have been unfavorable to defense counsel and therefore, defense counsel made a tactical decision to keep potentially damaging evidence out.

Victim Impact Statements were not improper: The court held that victim impact evidence at the guilt phase of a capital trial is a logical extension of the United States Supreme Court's precedent permitting victim impact evidence at sentencing. At the guilt phase, the prosecutor told the jury that one victim was five years old and the other victim was a cripple. In closing argument, the prosecution asked the jury to imagine what went through the victim's minds. These statements were not prejudicial because it was not "so pronounced and persistent" that it "permeated the entire atmosphere of the trial."

No *Brady* violation for failing to disclose inculpatory statements by Petitioner: No violation because there is no evidence that the prosecution knew of Petitioner's statements before trial, and since Petitioner allegedly uttered the statements, he knew whether he made the statements and could have advised counsel accordingly.

***Workman v. Summers*,**
2004 WL 2030051 (6th Cir. Aug. 31, 2004) (unpublished)

Clemency: Although death row inmates do not have a constitutional right to clemency proceedings, "some minimal procedural safeguards do apply to clemency proceedings regardless of whether the power to grant clemency is solely entrusted to the executive." Judicial review is limited to determining the existence of these procedures, but intervention may be necessary if "a state official flips a coin to determine whether to grant the prisoner clemency or if the state arbitrarily denies the prisoner access to its clemency process."

***Williams v. Bagley*,**
2004 WL 1800647 (6th Cir. Aug. 13, 2004)[5]
(death sentence affirmed)

Standard of review: The court's discussion of the AEDPA's limitation on relief mirrored *Baze*, *supra*, with two additional statements: "when a district court bases its decision on a transcript from the petitioner's state trial, and thus makes no credibility determinations or other apparent findings of fact, the district court's factual findings are reviewed de novo" and, state court decisions can rely on clearly established federal law without citing Supreme Court cases, or even evincing an awareness of the Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them."

A claim of ineffective assistance of counsel must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.

Unidentified evidence cannot satisfy the fundamental miscarriage of justice exception to procedural default: The fundamental miscarriage of justice exception is "open to a petitioner who submits new evidence showing that a constitutional violation has probably resulted in the conviction of one who is actually innocent." Actual innocence, however, is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." A petitioner must show by clear and convincing evidence that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence" or found him eligible for the death penalty. Petitioner failed to satisfy this standard because the evidence of guilt is strong and the evidence that should have presented at trial is not identified.

No abuse of discretion in denying a request for an evidentiary hearing: In order to obtain a federal evidentiary hearing, a petitioner must specify which claims warrant an evidentiary hearing and what could be discovered through an evidentiary hearing. Petitioner's request for an evidentiary hearing to show that IAC serves as cause for any procedural default does not satisfy this standard.

No abuse of discretion in denying discovery: Discovery in federal habeas cases is only available upon a showing of "good cause," which means specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief. Petitioner's many discovery requests failed because Petitioner 1) did not show how the requested evidence would establish prejudice; 2) did not specify which claims would be advanced by the requested materials; and, 3) did not show how the material would advance the IAC claim.

Automatic death penalty jurors did not sit on Petitioner's jury: A potential juror that says she probably would vote for the death penalty if there was any remote chance of parole was qualified to serve because she stated that she could follow the law and impose a life sentence if the state did not prove that the aggravating factors outweighed the mitigating factors.

Juror Misconduct/Bias: The court discussed the applicable law in detail. The right to a trial by an impartial jury means that the presence of even one biased juror deprives a defendant the right to an impartial jury. An adequate voir dire to identify unqualified jurors is essential to this right. "Because the preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury," questions directed at potential bias, such as questions about racial bias, are constitutionally compelled. A trial court's refusal to ask constitutionally compelled questions requires reversal. Qualified jurors, however, do not have to be totally ignorant of the facts. When faced with an allegation of bias, the issue becomes "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." If the allegation of bias is based on an extrinsic influence (media attention and newspaper articles) having reached the jury and having the potential to taint the jury, "clearly established Supreme Court precedent requires that the trial court take steps to determine what the effect of such extraneous information actually was on the jury." Generally, this is satisfied if the potentially biased juror "attests that he can set aside any information he has obtained and render a verdict based on the evidence presented in court." But, when the bias is based on a juror's non-disclosure during voir dire, a new trial is required when 1) a juror failed to answer honestly a material question on voir dire; and, 2) a correct response to the question would have provided a valid basis for a challenge for cause. Deliberate concealment on voir dire may but need not give rise to an inference of bias. Only motives for concealing information that affect a juror's impartiality merit disqualification. Otherwise, a petitioner must show actual bias. A trial court's finding of impartiality is a factual determination entitled to a presumption of correctness, overturned only for manifest error. Here, a juror who denied knowledge of the case during voir dire told another juror that the case was from Youngstown and involved drugs. Because, the record did not establish that the juror deliberately concealed information on voir dire, and concealment does not automatically give rise to a presumption of bias, the juror's concealment alone does not prove that the state court unreasonably determined that the juror was not biased. The fact that source of the bias was media reports also did not merit disqualification of the juror. The information she knew consisted of elemental facts which would have been learned during trial anyways, meaning that knowledge of the reports did not engender a bias. Because there was no reason to believe that the jurors' minimal knowledge of the case created an actual bias, the trial court was not required to conduct a colloquy of the juror.

Issues expressly not addressed by the Court: 1) whether there is a constitutional right to counsel when applying to reopen an appeal based on ineffective assistance of appellate counsel; and, 2) is an application to reopen that appeal part of the direct appeal?

Merritt dissenting: Would reverse based on the life and death qualification, and also advocates overruling precedent that requires excluding potential jurors who strongly oppose the death penalty, because "when those who disfavor the death penalty are excluded and strong death penalty proponents who would [] impose it are included, the death penalty becomes the inevitable result."

***King v. Bell*,**
2004 WL 1724551 (6th Cir. Aug. 3, 2004)
(granting equitable tolling)

Delay caused by the State: Because of a delay in the transcribing of voir dire, the federal district court granted an additional fifteen days to file the habeas petition (state agreed to this), which meant the petition was due after the one statute of limitations for filing a habeas petition had expired. Once the petition was filed, the State moved for summary judgment, which was granted after the district court decided not to equitably toll the statute of limitations.

Standard for reviewing decision not to apply equitable tolling: A decision not to apply equitable tolling is reviewed *de novo* under the following factors: "1) lack of actual notice of the filing requirement; 2) lack of constructive knowledge of filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; and 5) a plaintiff's reasonableness in remaining ignorant of the notice requirement." Although each equitable tolling case must be considered on a case by case basis, when ignorance of the filing requirement is not at issue, the inquiry must focus on diligence in pursing rights and ignorance of the effect of delay, for which in the habeas context, the State must provide evidence that is relevant to an equitable tolling inquiry. Each of these factors favors granting equitable tolling in the instant case.

Equitable tolling was appropriate: "Only the government's failure to produce the voir dire transcripts prevented [petitioner] from complying with the court's original scheduling order." The district court chose to accommodate the State's delay by granting a modified scheduling order, which in essence, equitably tolled the statute of limitations. Under these circumstances, the defendant cannot be held responsible meaning that equitable tolling must be applied because "[o]therwise, the government could prevent any defendant

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from filing a timely claim simply by failing to produce relevant evidence in a reasonable period, agreeing to a court-approved extended filing schedule, and then sandbagging him with a statute of limitations defense."

Equitable tolling issues expressly not reached by the Court: 1) whether a notice of intent to file a petition for habeas relief is sufficient to satisfy statute of limitations requirements; and, 2) whether agreement to a particular briefing schedule constitutes an implicit waiver of a statute of limitations defense.

***Thompson v. Bell*,**
373 F.3d 688 (6th Cir. June 23, 2004)

(*using inherent equitable powers to expand the record*): During federal habeas proceedings, the state failed to include the deposition of a physician as part of its motion for summary judgment. Subsequently, habeas counsel made a rule 60(b) motion in the district court asking to include the deposition as part of the record. Habeas counsel also submitted the deposition to the Sixth Circuit as part of a motion to hold the appeal in abeyance pending disposition of the Rule 60(b) motion. The Sixth Circuit, however, refused to consider the deposition, believing itself to be bound by the record created by the district court, and upheld the district court's grant of summary judgment in favor of the state. Upon further review of the record, conducted *sua sponte*, it became clear that the facts adduced in the deposition supported granting the writ of habeas corpus, because it was the only evidence showing that the petitioner suffered from mental illness at the time of the crime. Accordingly, the court, on its own motion, vacated its own order upholding the grant of summary judgment, reversed the district court, and remanded for further proceedings.

Federal Rule of Appellate Procedure 10(e) does not provide grounds for expanding the record: Although Rule 10(e) allows corrections of the appellate record to include matters omitted or misstated through error or accident, the rule does not allow the inclusion of material not considered by the district court.

Inherent power to reconsider own opinion allows expanding the record: "Although a court of appeals should withdraw an already-issued mandate only to prevent a miscarriage of justice," the court's "inherent power to reconsider [its] opinion prior to the issuance of the mandate" allows the court to "supplement the record on appeal, where the interests of justice require."

Judge Suhrheinrich concurring: Judge Suhrheinrich goes through great lengths explaining the facts of the case and how he reached the conclusion that the deposition required granting the writ of habeas corpus. Suhrheinrich also notes that the requirements for filing a successor habeas petition do not need to be satisfied because the matter is before the court on its own motion. But, even a successor habeas petition is not barred under these circumstances because the petition is premised upon fraud upon the court.[6]

***Sowell v. Bradshaw*,**
372 F.3d 821 (6th Cir. June 23, 2004)

(reversing the district court's grant of habeas relief because petitioner did not demonstrate that his jury trial waiver was not knowing and intelligent or that his counsel was ineffective in advising him to waive a jury trial).

Standard of review: Since this was a pre-AEDPA case, the court conducted *de novo* review of the district court's legal conclusions in granting a writ of habeas corpus, and factual finding review under the clearly erroneous standard. Factual findings are entitled to a presumption of correctness, but this presumption does not apply to mixed questions of law and fact or questions of law, which are reviewed *de novo*.

Exhaustion and Procedural Default: "The doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court. If the difference is merely a variation in the legal theory, rather than a different legal claim, the petitioner has exhausted his claim. Procedural default is a defense that the State is obligated to raise and preserve if it s not lose to the right to assert the defense thereafter. . . . Nonetheless, this court may consider a newly-raised default argument if it show wishes." In light of the serious consequences (death sentence) facing the petitioner, this Court chooses not to consider unpreserved claims of procedural default. Accordingly, because each claim of procedural default either 1) was not raised below; 2) was waived when the state failed to object to the testimony supporting the allegedly defaulted claim; or 3) was not defaulted (IAC –jury waiver claim properly raised below when entitled that waiver not knowing and intelligent because of counsel's advice to petitioner), the state's procedural default arguments must fail.

Expansion of the Record and Evidentiary Hearing: The Court reiterated its holding in *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), that where evidence on the same issue was presented in state court, the cause and prejudice requirement has to be met for petitioner to be entitled to a hearing, but "the district court nonetheless has inherent authority to hold an evidentiary hearing even if petitioner is not entitled to one."[7]

Merging the validity of the waiver of the right to a jury trial with counsel's ineffectiveness for not properly advising petitioner on his right to a jury trial: Because no legal precedent supports commingling the two claims, the district court should have considered each claim separately on the merits.

Petitioner's waiver of a jury trial was knowing and intelligent: Although the legal question of whether a waiver of a jury trial was knowing, intelligent, and voluntary is reviewed *de novo* and not presumed from a silent record, the burden of demonstrating that the waiver was not valid is on the defendant. While capital cases require a more extensive colloquy than other cases, colloquies concerning waiving a right to a jury trial are not constitutionally required. Accordingly, the district court erred in ruling that the trial court's colloquy was insufficient (individually or cumulatively) for failing to inquire whether anyone promised petitioner anything in return for waiving a jury trial, and failed to reflect that petitioner understood: 1) that the judge alone decides guilt or innocence if jury waived; 2) that jury is composed of twelve people; 3) that he may participate in selecting the twelve jurors; 4) that any verdict rendered by the jury must be unanimous; and, 5) that a jury waiver would still leave him eligible for a death sentence. Furthermore, despite Petitioner's now intelligence, there is no evidence in the record showing that petitioner believed that the three judge panel could not impose a death sentence. If such evidence existed, the result may be different because believing that a three judge panel could not impose a death sentence and believing that they would not impose a death sentence is a significant difference with the latter addressing a mistake of law.

Counsel was not ineffective for advising petitioner to waive a jury trial: Because IAC claims are mixed questions of law and fact, both the state and federal court determinations are reviewed *de novo*. Under this standard, trial counsel was not ineffective because 1) counsel discussed the waiver at length with Petitioner; and, 2) Petitioner trusted counsel and decided to waive a jury trial solely because of counsel's recommendation.

Judge Moore dissenting: Moore would uphold the district court's grant of habeas relief because he believed that, given Petitioner's mental infirmities and the scant colloquy, Petitioner did not understand the difference between a jury trial and a bench trial

***Baze v. Parker*,**
371 F.3d 310 (6th Cir. June 9, 2004) (denying habeas relief)[8]

Standard of Review: When reviewing the denial of habeas relief, the district court's legal conclusions are reviewed *de novo*, and it factual findings under a clearly erroneous standard. The Anti-Terrorism and Effective Death Penalty Act (applies to this case) prevents the grant of relief on any claim adjudicated in state court unless the adjudication of the claim 1) "resulted in a decision that was contrary to, or an involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court; or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court." "Contrary to" means the "state court arrives at a conclusion opposite to that reached by the Court on a question of law, or if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the Court's decision." "Unreasonable application" means the state court "correctly identifies the governing legal standard but applies that standard in an objectively unreasonable, as opposed to merely incorrect, manner." State findings of fact are presumed to be correct until rebutted by clear and convincing evidence. And, "review is conducted in light of the law as it existed at the time of the final state court decision, unless an intervening constitutional decision announces a watershed rule of criminal law with implications for the fundamental fairness of the trial proceeding."[9]

Counsel was not ineffective for negligently omitting a correctional officer from the list of peremptory challenge: The court reviewed this procedurally defaulted claim because the Kentucky Supreme Court reviewed the claim on its merits, albeit in summary fashion, and because the Commonwealth waived procedural default by not raising it in the court below. Nonetheless, the court denied this claim because no plausible argument for prejudice can be made since eleven jurors (including the correctional officer) were neutral on the death penalty, while one leaned against the death penalty and two leaned in favor of it.

Right to present a defense and EED instruction: The trial court's refusal to allow Petitioner to base his defense on a feud with his wife's family (including shooting at Petitioner) because the two victims were not directly involved in the family altercation and Petitioner did not have a contentious relationship with either of the victims, did not deprive Petitioner of his constitutional right to present witnesses in his own defense. This right, however, is subject to state rules of procedure and evidence designed to assure both fairness and reliability. "Only if 'an evidentiary ruling is so egregious that it results in a denial of fundamental fairness does it . . . violate due process.'" To obtain an EED instruction, a defendant must produce "some definitive, non-speculative evidence that the onset of the extreme emotional disturbance was caused by a triggering event." A triggering event "may extend over a period of time, but its onset must be sudden and its effects uninterrupted." That is where Petitioner's argument fails. He points to no "isolated event in that conflict that could have caused him to lose temporary control of sense of right and wrong."

Not being allowed to tell jury of current prison sentence to be served consecutively: The trial court did not err in refusing to inform the jury about Petitioner's sentence for a firearms conviction, which was on appeal, because if the jury considered the consecutive sentence for the firearms con-

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viction as mitigation and that sentence was overturned, the jury's sentencing decision would have been based on a false premise.

Cole dissenting: Kentucky law imposes no categorical limitation on the types of events that may trigger EED, and a triggering event must be measured from the perspective of the defendant. Whether a non-final sentence is mitigating is the type of inquiry that should be left to the jury.

KENTUCKY SUPREME COURT CASES[10]

***Quarels v. Commonwealth*,**
2004 WL 1906842 (Ky. Aug. 26, 2004)

The court held 1) that an aggravating factor that duplicates one of the underlying offenses does not constitute double jeopardy (first degree arson conviction and arson aggravator), and 2) that there is no error in refusing to allow testimony by appellant's boyfriend concerning the effect a death sentence would have on appellant's children because the testimony presumably would not have been relevant to appellant's character. The court, however, notes that the testimony was not preserved by avowal, thereby preventing the court from determining the exact nature of the boyfriend's testimony.[11]

Keller, concurring: Evidence of the effect the death penalty would have on children clearly is "evidence in support of leniency" and therefore is admissible under K.R.S. section 532.055, which is applicable to capital cases.[12]

***Sherroan v. Commonwealth*,**
2004 WL 1906188 (Ky. Aug. 26, 2004)

After noting that the Kentucky Supreme Court is the only court that has held that a juror is disqualified if the juror cannot consider the minimum authorized sentence for the indicted offense, the court held that asking potential jurors how they would weigh specific mitigating circumstances or the penalty range for lesser included offenses would ignore well settled law that it is impermissible to ask voir dire questions designed to commit jurors to certain theories. The law only requires that juries be instructed to consider mitigating circumstances supported by federal law.

Endnotes:

1. This means there are currently four votes to overturn *Teague* at least in capital cases.
2. Rule 60(b) is commonly used to attack the validity of the adjudication of the federal habeas corpus proceedings based on claims such as fraud, or new evidence.
3. In addition to the claims discussed below, the court denied the following claims: 1) IAC for failing to consult with and obtain an expert on the effects of cocaine on the human body; 2) denial of an impartial jury by permitting peremptory challenges on jurors who opposed the death penalty; 3) that it was improper for the prosecution to comment that Petitioner's mitigation statement was unsworn; 4) that the prosecutor implied Petitioner's guilt by over emphasizing the importance of the indictment; 5) the prosecutor told the jury that the trial court did not believe Petitioner's intoxication or insanity defenses; 6) prosecutor suggesting that defense counsel had no doubt that Petitioner was guilty (denied because defense counsel said the evidence would show he committed these dastardly acts); 7) prosecution's practice of using investigators to conduct record checks of the jurors (denied because of overwhelming evidence of guilt and no evidence showed that record checks conducted in violation of state or federal law); 8) IAC for referring to Petitioner's crimes as "dastardly" and "heinous" (denied as tactical decision); 9) IAC for commenting that Petitioner would not be eligible for parole for 80 years; 10) IAC for commenting that "there is a special hell in Dante for those righteous people that have to mete out justice"; and, 11) IAC for failing to object to the prosecution's comment about recidivism. Because of the number of cases in this update, the dissenting opinion is not discussed.
4. The failure to properly raise an IAC on direct appeal claim could result in a court finding cause to excuse the default, but ruling that the underlying claim was not presented for review on the merits. In order to preserve an IAC on direct appeal claim, counsel must 1) assert IAC as cause and prejudice to excuse the procedural default; 2) assert direct appeal counsel's ineffectiveness as an independent claim (either for not raising a claim on direct appeal or incompetence in preparing, drafting, or filing the direct); and, 3) if the claim is based on trial counsel's conduct, assert trial counsel's ineffectiveness as an independent claim.
5. In addition to the claims discussed below, the court also held that: 1) AEDPA applies to convictions that predated AEDPA; 2) challenges to electrocution are moot because lethal injection is now the sole method of execution; 3) requiring a sentence of death when the aggravating factors outweigh the mitigating factors does not create a mandatory death penalty; 4) requiring that any report generated because of a defendant's request for a pre-sentence investigation or a mental health evaluation be submitted to the jury does not violate the 6th or 14th amendments; 5) prosecutorial discretion in the indicting decision does not allow the arbitrary and discriminatory imposition of the death penalty; 6) establishing proportionality review does not create a constitutionally protected liberty interest under the due process clause; 7) res judicata is an adequate and independent state ground for barring habeas review of constitutional claims even if the state post conviction system does not provide adequate discovery; 8) the contemporaneous objection rule is independent of federal law; 9) plain error review by an appellate court constitutes enforcement of the contemporaneous objection rule; a general allegation of prosecutorial misconduct without raising the specific theo-

ries underlying the allegations does conform with the exhaustion requirement that "a claim be presented to the state courts under the same theory in which it is later presented in federal court"; The court also summarily disposed of many other constitutional challenges to Ohio's capital punishment scheme.

6. This suggests that procedurally defaulted claims or previously raised claims can be raised in a second habeas petition without being subject to the strict constraints of the Anti-Terrorism and Effective Death Penalty Act, if the premise for the claim was known to be inaccurate by one of the parties, even if the inaccuracy could have been discovered by due diligence (i.e., a case where the state has repeatedly claimed that it has turned over all *Brady* material, which defense counsel later discover to be inaccurate).

7.There are many other grounds for which a federal evidentiary hearing may be granted. *See* (*Michael*) *Williams v. Taylor*, 529 U.S. 420 (2000).

8. In addition to the claims discussed herein, the court also denied the following claims: 1) a challenge to Kentucky's rule requiring simultaneous exercise of peremptory challenges (court held the claim is beyond the court's jurisdiction to review because it stems from the application of state procedural rules); 2) the failure to excuse a juror whose brother-in-law was, on occasion, petitioner's jailer (court held that this is not grounds for automatic exclusion and petitioner failed to show any express bias by this juror); 3) the failure to excuse a juror whose sister-in-law was murdered (court held that statement that juror wanted to see justice done in sister-in-law's murder, where the defendant was sentenced to death, is not enough in itself to establish bias); 4) being forced to use peremptory challenges on jurors who should have been excused for cause (court held that it is not a constitutional violation to be forced to use a peremptory strike on a juror who should have been removed for cause); 5) denial of the right to rebut testimony that the victims were not aggressive with evidence that one victim previously shot out the tires of a suspect and asked the suspect if he would like to meet his maker (court held that despite petitioner's knowledge of these statements, the statements are subject to possible interpretations and therefore, excluding the statements did not deny petitioner his due process rights); 6) fair trial violation for informing the jury of the nature of Ohio criminal charges against Petitioner (court held that any error rectified by trial court instruction that Ohio charges not relevant to petitioner's guilt in the present case and that petitioner offered no way around the prohibition against a federal court revisiting state court decisions); 7) jury form improperly stated the minimum punishment as 25 years before possibility of parole when the correct number of years was 20 (court held that while the opposite error on the jury form would raise a constitutional claim, it makes no sense that stating a higher than possible sentence on the verdict form prejudiced petitioner when the jury imposed a death sentence); 8) trial judge's admonition regarding legal irrelevance of petitioner's belief that he was not wanted in Ohio violated his constitutional rights (court held that judge only acting responsibly in clarifying to jury that law permits a law officer to arrest a person without a warrant upon a reasonable belief that the person is charged with a crime in another state); and, 9) refusal to grant an imperfect self defense instruction (court held that Kentucky law requires acquittal if a suspect resists arrest by an officer using more force than necessary——an instruction that was given to the jury so when the jury did not acquit Petitioner, they found that reasonable force was used, therefore precluding any defense of justification).

9. This is probably incorrect to the extent that it does not include every rule given full retroactive effect by the United States Supreme Court.

10. The Kentucky Supreme Court's denial of William Eugene Thompson's direct appeal will be discussed when the case is final after ruling on the petition for rehearing. In other Kentucky capital news, Miguel Soto's petition for rehearing was denied by the Kentucky Supreme Court on August 26 (case discussed in July edition), Thomas C. Bowling's petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit was denied on October 4, 2004, John Garland's petition for a writ of certiorari to the Kentucky Supreme Court was denied on October 4, 2004, Ralph Baze's petition for rehearing before the Sixth Circuit was denied, Thomas C. Bowling filed a petition to vacate his death sentence due to mental retardation, and Ralph Baze and Thomas C. Bowling have filed a civil action challenging the chemicals utilized in lethal injections, inadequate execution procedures, and the lack of training of the execution team.

11. The court appears to have stated that the effect the death penalty would have on individuals other than the defendant, and any impact testimony that the death penalty should not be imposed, is admissible where it mitigates towards a lesser sentence and is based on the character and record of the defendant or the circumstances of offense. Taking this to it logical next step, trial counsel may be ineffective for failing to investigate the death penalty viewpoints of victim's family members if it later learned that they opposed the death penalty for the defendant for some reason related to the defendant or the offense.

12. This means that any potentially mitigating evidence that does not fit the *Lockett* requirement for relevant mitigating evidence (character and record of the defendant or circumstances of the offense) still constitutes grounds for leniency that would be admissible under K.R.S. 532.055. ■

"The attorneys work extremely hard keeping up with the work," Sexton said. "The consequences could be catastrophic. My job as an administrator is to keep that ever in mind."

Messenger-Inquirer
10-31-04

FIREARMS AND BALLISTICS

Warren Allred

"The sooner, the better"… that old adage rings true in many situations. It is especially applicable in criminal defense. When information is obtained at the start of a case, it can do nothing but help in the investigation. This is particularly true in cases involving firearms. Many factors play a role in cases involving a gun and when information is gained early it can play a big role in the defense. Many small bits of information can help to piece the whole puzzle together. Oftentimes, details provided at a preliminary hearing are sketchy, at best. More information may be obtained later from discovery, but much of that information may prove to have been more useful at the start of the investigation. If information is obtained later, it may be impossible to determine the accuracy of that information. Crime scenes change, evidence may not have been collected, witness statements may change, notes may be inaccurate. That is why it is important to get more pieces of the puzzle as early as possible. The following is an outline to assist with questioning in cases involving the use of a firearm.

Firearms/Ballistics Questions

- **How many shots were fired? How many shots can be accounted for?** (*ex*. If many shots were fired, how many holes are there in the victim or thing that was shot?)
- **What type of weapon was used? Rifle? Shotgun? Handgun? What caliber? How many weapons were involved?**
- **Was a weapon recovered or was one described by the victim/witness?**
- **Was it a revolver or a semi-automatic?**
  ****If a weapon was recovered……..*
  - *If a **revolver**—were there any cartridges or fired shell casings in the cylinder?*
  - *If a **semi-automatic**—were there any cartridges in the magazine?* If so, *how many? How many does the magazine hold?*
  - *Same question for rifles and shotguns.*
- **Were any shell casings recovered?** *If so,* How many? What caliber? Location where recovered?
  - *If a weapon was recovered or described,* did shell casings appear to be of the same caliber?
- **Were any projectiles recovered?** *If so,* How many? Location?
  - *If a weapon was recovered or described*, did the projectiles appear to match the caliber described?
- **At what distance were the shots fired?**
- **Was the victim's clothing collected?** *If so,* How was it collected and package?
  - The clothing may be useful in distance determination.
- **Was a Gunshot Residue Kit performed?** *If so,* was one performed on the victim? When was the kit done? Was a test done on the victim? (ask this in cases involving multiple guns or self-defense type cases)

All of these things can be important in determining the facts of the case and confirming information received. They may also play a part in shedding light on new facts that may not have been considering prior to the preliminary hearing.■

"We are approaching that point when our public defenders are simply unable to perform their essential task of defending the accused due to these crushing caseloads," said Public Advocate Ernie Lewis, who directs the department.

"Kentuckians want to believe that the quality of justice a defendant gets doesn't depend on the money available to pay a lawyer, Lewis said. "These caseloads threaten that fundamental belief," he said.

The Kentucky Post
9-28-2004

"[Pikeville Directing Attorney Harolyn] Howard is quick to point out that it isn't the clients who suffer. Instead, she says, it is the families of the attorneys and the attorneys themselves. 'We don't shortchange the client,' she said. 'What we short change is ourselves.'"

Appalachian News-Express
10-08-2004

6TH CIRCUIT CASES

David Harris

***Guerrero v. United States*,**
___ F.3d ___, 2004 WL 2002273 (6th Cir. 2004)

Appeal from Denial of *Habeas Corpus*

Petitioner convicted of nine charges of cocaine trafficking and sentenced to 175 years. Petitioner's *habeas corpus* denied by district court, and he appeals to the 6th Circuit.

The sole issue on appeal is whether Petitioner was denied his 6th Amendment right to effective assistance of counsel. Petitioner claims that his attorney failed to communicate a plea offer made by the government. 6th Circuit reviews the facts determined by the district court (from an evidentiary hearing) using the "clearly erroneous" standard.

The district court made the factual finding that no plea offer was ever made. The evidence offered by Petitioner consisted of: 1) his wife's claim that Petitioner's attorney told her the government made an offer but that because it was not good he would not tell Petitioner about it, 2) trial counsel could not find his file, and could not remember any offer being made in the case, and despite his usual practice of communicating all offers to the client it was "possible" there was an offer in this case, 3) Petitioner's testimony that he was never informed about any offer.

Evidence against Petitioner: 1) prosecutor did not believe any deals offered, 2) DEA Agent, who "would've been told" did not remember any offers being made, 3) wife's testimony less credible because she only told Petitioner about this 10 years later, and memory suspect because though she remembered signing an affidavit for this case she couldn't remember if she got it notarized.

The 6th Circuit determined that the district court's factual findings that no plea was offered was not clearly erroneous, and therefore affirmed the lower court's denial of Petitioner's *habeas corpus* petition.

Note: The 6th Circuit commented that the district court erred when it considered the fact that Petitioner strenuously claimed his innocence throughout the case, as a factor in determining whether there was an offer. Citing *Griffin v. United States*, 330 F.3d 733 (6th Cir. 2003), the court commented that a defendant is entitled to maintain innocence at all times, and therefore repeated declarations of innocence were not dispositive on the issue.

***Lordi v. Ishee*,**
___ F.3d ____, 2004 WL 2008211 (6th Cir. 2004)

Appeal from Denial of *Habeas Corpus*

Petitioner convicted of several charges resulting from abuse of public office.

Petitioner has two issues on appeal: 1) was trial counsel constitutionally ineffective due to a conflict of interest, and 2) was Petitioner deprived of an impartial jury due to trial court's decision not to investigate an allegation of juror bias.

Trial counsel's legal partner, bearing the same last name, represented one of the government's witnesses in a prior, unrelated felony case which resulted in a misdemeanor guilty plea to "falsification." Though conflicts usually contain a presumption of prejudice (*see Culyer v. Sullivan*, 446 U.S. 335 (1980)), the 6th Circuit noted that this standard was inapplicable to cases of successive representations, such as this (*see McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004)). The state court determined that cross-examination of the government witness did not require counsel to disregard any of his duties to Petitioner. The 6th Circuit determined that this finding was not erroneous, and there was no evidence that the potential conflict due to successive representation ever developed into actual conflict.

As for juror bias, defense counsel was called during trial by an anonymous tipster who claimed that she was a member of the venire, and overheard an impaneled juror make the comment "this guy is guilty." When defense counsel brought this to the court's attention, the trial court determined that an anonymous tip alone was insufficient to warrant an independent investigation into the matter, and that further inquiry ran the risk of tilting the juror toward the defense. The court determined that Petitioner had not met his burden of demonstrating that the lower court's decision was objectively unreasonable.

The 6th Circuit affirmed the district court's denial of *habeas corpus* relief.

Note, however, the dissenting judge believed that the failure of the trial court to permit the defense to inquire into possible juror bias, or even make any inquiry, was error, and would have reversed.

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Wiegand v. United States,
380 F.3d 890 (6th Cir. 2004)

Habeas corpus petition filed within one year of *Jones v. United States*, 529 U.S. 848 (2000), a case which limited the scope of the federal arson statute, *i.e.* decriminalizing actions which had previously been considered in violation of the statute. AEDPA requires *habeas corpus* petition to be filed within one year from the date a right is initially recognized by the Supreme Court and is made retroactively applicable. After determining that any federal court can answer the question of retroactivity, the 6th Circuit remands the instant case back to district court for a determination as to whether *Jones* is to be made retroactively applicable to cases such as Petitioner's.

Cowherd v. Million,
380 F.3d 909 (6th Cir. 2004)

en banc decision by 6th Circuit Court of Appeals; overrules *Austin v. Mitchell*, 200 F.3d 391 (6th Cir. 1999)

Petitioner sentenced to 104 years. After denial of direct appeal, Petitioner files several post-conviction motions in state court, which are ultimately unsuccessful. Finally, Petitioner files *habeas corpus* petition in the federal court. The habeas is dismissed as untimely. Though filed within one year of the finality of his last post-conviction motion, it is argued by the state that Petitioner did not raise any federal claims in that motion. The section in question reads: "(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. § 2244 (d)(2)."

According to *Austin v. Mitchell*, the "judgment or claim" language was read to require the post-conviction motion to address a federal issue. Thus, according to this rationale, if Petitioner's last post-conviction motion did not raise any federal issues, it would not effectively toll the AEDPA's one-year statute of limitations. The claim here was that Petitioner's last post-conviction motion failed to raise any federal issues, and therefore his time to file a *habeas corpus* petition had run out.

After reviewing several other federal circuits' analyses and considering some policy arguments, the 6th Circuit Court of Appeals overruled *Austin* and broadened the interpretation of "judgment or claim" to include other actions such as post-conviction claims seeking non-federal remedies. The instant case was reversed and remanded for further consideration in light of the decision that its filing was not untimely.

Thaqi v. Jenifer,
377 F.3d 500 (6th Cir. 2004)

6th Circuit reverses district court's denial of Petitioner's *habeas corpus* in which he challenged a determination by the Board of Immigration Appeals that he was not a candidate for discretionary waiver of deportation.

Petitioner pled guilty to his second felony in December 1995. As a legal resident/foreign citizen, this second felony made Petitioner eligible for deportation. However, under § 212 (c) of the Immigration and Nationality Act ("INA"), Petitioner was eligible for a discretionary waiver of deportability, because neither of his felony convictions were "aggravated felonies."

The AEDPA was enacted in 1996. It revised the eligibility requirements for a discretionary waiver of deportability. Among other things, the change made aliens who were convicted of two unconnected crimes of moral turpitude ineligible for a discretionary waiver. In 1997, after enactment of the AEDPA, the INS sought to deport Petitioner.

Petitioner conceded that he was eligible for deportation, but sought relief under the discretionary waiver of deportation, permitted under §212 (c) of the INA at the time of his last conviction. This relief was denied. On request for rehearing, the Board of Immigration Appeals commented that Petitioner was ineligible for a §212 (c) waiver because one of his convictions resulted from a jury trial. The federal district court, subsequently denied *habeas corpus* relief from the BIA's decision.

The 6th Circuit reversed, finding that this was an unreasonable application of Supreme Court precedent, referring specifically to the U.S. Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the defendant pled guilty prior to AEDPA enactment to a drug crime that disqualified him for discretionary waiver of deportation under the subsequent AEDPA law and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). The Supreme Court found that Congress had not expressly intended that this law be applied retroactively. This found, the court moved next to whether retroactively applying the new law would "produce an impermissible retroactive effect." The *St. Cyr* court held that: "The potential for unfairness in the retroactive application of IIRIRA's § 304 (b) [which repealed INA § 212 (c)] to people like Jideonwo and St. Cyr is significant and manifest. Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212 (c) relief, a great number of defendants in Jideonwo's and St. Cyr's position agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens' belief in their continued eligibility for § 212 (c) relief, it would surely be contrary to famil-

iar considerations of fair notice, reasonable reliance, and settled expectations to hold that IIRIRA's subsequent restrictions deprive them of any possibility of such relief." *Thaqi* at 503, (*citing INS v. St. Cyr*, 533 U.S. at 320-24.)

Likewise, the 6th Circuit in the instant case found no indication that Congress intended to apply the relevant portion of AEDPA retroactively. Further, Petitioner's second conviction, the one that according to the new AEDPA law would make him ineligible for a discretionary waiver of deportability, was obtained by guilty plea. Thus, applying the reasoning of *St. Cyr* above, the 6th Circuit determined that enforcing the AEDPA against Petitioner would have an impermissible retroactive effect. This case was reversed and remanded to the district court.

Note: the court commented that had both of Petitioner's convictions resulted from jury trials, then according to the 1st, 2nd, 4th and 9th Circuits no impermissible retroactive effects could be found. The court left it by stating that this case did not contain those facts.

***Millender v. Adams*,**
376 F.3d 520 (6th Cir. 2004)

6th Circuit Affirms District Court's Denial of Petition of Writ for *Habeas Corpus*

Petitioner convicted after jury trial of many violent crimes. 6th Circuit considers four claims for relief: 1) ineffective assistance of counsel, 2) trial court's failure to give jury specific instructions *sua sponte*, 3) prosecutorial misconduct in inappropriate argument, and 4) cumulative effect.

Applying the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), the 6th Circuit found that Petitioner was not denied effective assistance of counsel in any of his claims: 1) failure to move to suppress evidence from witness and voice-identification lineups and in-court identifications invalid because nothing impermissibly suggestive about lineups and identifications; 2) failure to object to the introduction of weapons and pictures not proven to be used in the crime invalid because fact that no fingerprints and not found in his possession could have weighed in Petitioner's favor; 3) failure to make an opening statement claim invalid because this is a "mere matter of trial tactics;" 4) failing to request jury instructions on mistaken identity and impeachment of witnesses by prior inconsistent statements invalid because no prejudice shown where closing arguments covered these issues for the jury; 5) failure to object to prosecutorial misconduct during prosecutor's closing argument invalid because prosecutor's remarks were not improper; 6) failure to call a rebuttal witness invalid because "rebuttal" would have been of a collateral, non-exculpatory issue; and 7) cumulative effect of IAC errors invalid because court did not find any IAC errors.

Next, the 6th Circuit determined that the trial court did not err in failing to *sua sponte* instruct the jury on mistaken identity and impeachment by prior inconsistent statement. This alleged failure, which above was determined as non-prejudicial even assuming error, failed to amount to a fundamental miscarriage of justice, and would not have added any elements to his defense.

Third, the court held that the allegedly false statements by the prosecutor did not amount to a denial of due process, and that there is no reason to believe that the prosecutor's remarks confused the jury.

Finally, as no errors were found, there could be no cumulative effect.

***Clinkscale v. Carter*,**
375 F.3d 430 (6th Cir. 2004)

6th Circuit Reverses District Court and Grants Conditional Writ of *Habeas Corpus*

Petitioner convicted of murder, armed robbery, and several other charges relating to a home robbery in which a man was killed and his wife, who was shot three times, survived and identified the accused. Jury elected Life Without Possibility of Parole over death.

Petitioner's sole meritorious claim addressed by the 6th Circuit was that his attorneys were ineffective for failing to file a timely notice of intent to use an alibi defense. Upon meeting with his attorneys, Petitioner immediately informed them that he was in another town over one hundred miles away throughout the complete evening/morning in question. The murder/robbery happened around 3:15 a.m. Petitioner told his attorneys that he was at a friend's house watching football, and his girlfriend got there later in the evening. That night, Petitioner and his girlfriend stayed at the friend's house. The girlfriend slept until about 4:00 or 4:30 a.m., at which time she nudged the sleeping Petitioner, and told him she was leaving. A little later, Petitioner went to his father's house, where he accidentally set off the alarm upon entering. He and his father had a conversation at approximately 5:45 or 6:00 a.m.

Petitioner's attorneys sent an investigator to look into these claims. The investigator, through his report and later an affidavit, indicated that he interviewed the father, girlfriend and friend, and that he believed that Petitioner's alibi was consistent and could be corroborated through these and possibly more witnesses.

However, Petitioner's attorneys did not file the required notice of alibi defense until the day trial was supposed to begin. Due to non-compliance with the applicable Ohio statute, the trial court did not permit alibi witnesses to testify.

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Petitioner raised this as an ineffective assistance of counsel claim in the Ohio Court of Appeals, which is permissible in Ohio, though post-conviction is the preferred route for these claims. The Ohio Court of Appeals held that it was unable to decide this issue, as it could not rule whether or not the failure was some sort of trial strategy. Ohio's Supreme Court affirmed, and denied rehearing. The federal district court denied *habeas corpus* relief. Finally, after determining that Petitioner met the exhaustion requirements for federal review and was not procedurally defaulted, the 6th Circuit Court of Appeals turned to the merits.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), two prongs must be met to prove ineffective assistance of counsel. First, the attorney's performance must be deficient, *i.e.* outside the range of professional competence, and second, there must be a reasonable probability that, but for this deficient performance, the result of the proceeding would have been different.

The 6th Circuit determined that missing the alibi deadline, especially in light of the fact that this was Petitioner's only defense, constituted deficient performance. The court noted that even if this was somehow "strategy," which seemed unlikely, it was still unreasonable. Had counsel filed the notice, they would have been free to abandon the defense or change tactics, but missing the deadline precluded the use of the defense.

The court also found prejudice. The record included an affidavit from the father detailing the conversation he had with Petitioner and discussing his meeting with Petitioner's investigator. Next, the investigator's notes and affidavit suggested that from early on in the representation it appeared that the alibi defense could be corroborated. Next, this was Petitioner's only defense, which because of the failure to file timely notice, only his own, uncorroborated testimony was deemed admissible. Finally, the prosecution's case contained a notable weakness. The surviving victim, who placed a call to 911 shortly after the shooting, told the operator that she did not know who the assailants were. It was only later that she "realized" that it was Petitioner, a friend of her husband. Shortly thereafter she further "remembered" and named Petitioner's alleged accomplice. However, prior to trial, the police had conclusively determined that the person she named as accomplice could not have been involved in these crimes. Thus, because of the failure to pursue an alibi defense and present any alibi evidence other than Petitioner's own testimony, the entire case boiled down to a he said-she said between victim/witness and Petitioner.

The 6th Circuit held that Petitioner was denied his constitutional right to effective assistance of counsel, reversed the district court, and granted a conditional writ of *habeas corpus*, giving Ohio 90 days to either retry Petitioner or to release him from custody. ■

6th Circuit Upholds Accident Reconstruction Testimony

In a vehicle rollover case, the Sixth Circuit has affirmed the trial court's decision admitting the defendant's accident reconstructionist's testimony, even though it was based in part on the presence at the accident scene of broken glass and other items not found until sixteen months after the crash. Under Kentucky common law, "the subsequent existence of a temporary condition, such as tracks or debris on a much-traveled road, is not admissible as evidence where considerable time has intervened and there is no showing that the condition has remained the same in the interval." *Mountain Petroleum Co. v. Howard*, Ky., 351 S.W.2d 178, 180 (1961). But the debris found by the defense expert was concealed by foliage, and the Sixth Circuit agreed with the defendant that it was not so transient as to bar admissibility. The panel also noted that the Kentucky cases cited by the plaintiff involved fact witness testimony concerning transient conditions, not testimony by experts. *See Smith v. Toyota Motor Corp.*, No. 01-6585 (6th Cir. July 14, 2004) (Boggs, Batchelder & Sutton, JJ.) (unpublished).

WELCOME TO MY WORLD: OUTSIDE LOOKING IN – UNDERSTANDING WHAT AWAITS YOUR CONVICTED CLIENT

Robert E. Hubbard

With the imposition of the sentence the trial attorney brings another case to a close. For the client, a new and different phase of life begins. What would it be like to walk in the shoes of your client? So many rules, so many regulations, so many unanswered questions, so little hope. How can we make sense of it all? What lies ahead? In this multi-part article we take an inside look at the classification process, transfers, various rules and regulations and the programs and possibilities that await and effect the lives of our clients immediately following their conviction, during their incarceration, after their release and throughout their life.

Initial Reception

Generally, for the newly sentenced client, parole/shock probation violator, or escapee, transition into Kentucky's correctional system starts with the receipt of specific court records by Department of Corrections (DOC) staff at the Assessment Center (AC). For male inmates this Center is located at Roederer Correctional Complex (RCC) and for women at the Kentucky Correctional Institution for Women (KCIW). Given the nature of their responsibilities the AC is autonomous from any institution relative to policy, structure and operations.

Exceptions to this general "intake" procedure is found in cases where the death penalty is imposed and male inmates are sent directly to the Kentucky State Penitentiary (KSP) and women directly to the Special Management Unit (SMU) at KCIW. Also, exceptions may be made for inmates with special medical, psychological or security requirements who can be sent to any appropriate facility as determined by the Classification Branch Manager or his designee and, in certain instances, minimum custody parole violators and escapees who can be processed at any secure institution.

Controlled Intake

Upon receipt of the initial court documents placing the inmate in the legal care and custody of DOC, staff at AC place the inmate in what is called "Controlled Intake" (CI). Controlled Intake provides the means by which correctional officials may effectively and efficiently coordinate the statewide transfers of inmates between jails and institutions. Once placed in CI status and from the date of final sentencing, even though they are not physically within the state prison system, the client no longer receives jail time credit; they begin to receive "credit for time served." Once in CI status the inmate must wait for an available bed to open up before being transferred to AC for further processing.

Inmates who are eligible for participation in the Class "C" and "D" program (*See* KRS 532.100(4,5,6,7) will not be sent to AC for further processing. Rather, their review is performed by a special team of staff and based solely on the paperwork submitted by the courts and the local detention facilities. Once approved by the team they are normally, but not necessarily, assigned to the local facility at which they are housed. Their records are then sent to "Jail Management" in Frankfort which is responsible for overseeing any further actions that originate during the inmate's term of incarceration.

As inmate's are received at AC from the local detention facilities, they will be searched and their property inventoried. Many items they may be accustomed to having will no longer be allowed: it becomes "contraband" and the inmate faces a "write-up" and "court call" if it is found in their possession. As such, the inmate is given an opportunity to store, send home or otherwise dispose of any prohibited items.

During September 2004, AC staff processed a total of 615 incoming inmates; 535 of these were men, 80 were women. During that same month 500 men were processed through controlled intake, *i.e.*, transferred (shipped) to the institution to which they had been initially classified.

Initial Classification

At the AC the inmate is assigned an institutional number and classification by an assigned caseworker working in conjunction with a classification committee begins. During the classification process, which normally takes place within two weeks of the inmate's admission, AC staff will administer various tests to assist in the evaluation of programs and placement options, and determine the custody level and relevant needs of the inmate. The inmate has the opportunity and is encouraged to take an active role in the classification process. The initial transfer to the inmate's assigned institution, unlike the classification process itself, does not usually occur so quickly. Clients classified as maximum or me-

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dium level inmates may expect to remain at AC approximately 3 months. Minimum security level inmates may expect a transfer within approximately 3-4 weeks.

Orientation

The AC operates 2 orientation programs that work in conjunction with the processing and classification of inmates. One, a regular program established for the new offender entering the system for the first time or for a repeat offender who has been out of the system more than 12 months. This orientation covers the general rules, regulations, levels of custody, placements and programs that the inmate will be subject to and that are available during their term of imprisonment. The second program, more condensed in nature, is utilized for inmates who have been absent for less than one year. This program is designed to update an inmate's medical condition and provide a review of changes in rules and procedures that may have occurred during an inmate's absence. This 2nd program is utilized for returned parole or shock probation violators, escapees or inmates received from a court and who have been gone more than 6 months. Another crucial part of the inmate's orientation is the medical, dental, and mental health screenings that will be conducted. Since the inmate may expect to remain at the AC for some time, provisions have been made for recreation periods, the inmate's ability to attend religious services, receive mail and visits.

The inmate will be allowed visits after being at their institution for 60 days. The institution must have a proposed visiting list for individuals who may wish to visit. The inmate may have 3 other listed visitors in addition to immediate family members. Those family members must be listed on the Pre-Sentence Investigation Report (PSI). Only 3 adults at a time are allowed to visit and the visitors must be listed in the computer at their institution by Thursday before their scheduled visit, which may occur on either Saturday or Sunday between 8:30 a.m. and 11:30 a.m. What this means in practice is that the visitation must be coordinated with all visitors since if an individual visits on Saturday no additional visits are allowed on Sunday.

Working with a broad spectrum of volunteers the AC attempts to provide religious services for any faith group and will accommodate as fully as possible the basic tenants of any faith. If volunteers for a specific faith group are not already registered the institution will attempt to solicit volunteers in providing appropriate services for the inmate. Different services related to the various faith groups/denominations are held each day of the week.

In order to assist the inmate in maintaining contact with family and friends, the institution allows for the inmate to send and receive correspondence. The inmate may correspond with any individual they choose except that correspondence with other inmates may be limited based on the policy of the particular institution where the other inmate is located. Privileged correspondence including court tapes must be clearly identified as such and come directly from the sender entitled to claim such privilege. Although the inmate may receive no packages at their stay at AC they are allowed to receive either postal money orders or Western Union money transfers; however, those monies must be sent directly to the inmate without additional correspondence being enclosed. The institution does not allow any envelopes containing nude pictures or any types of items, which have been taped or glued or stuck either to the envelope or to individual pieces of paper. Further, while the inmate is allowed to receive reading material, items of that nature must come directly from the bookstore or the publisher.

Initial Custody Document

The initial custody document is divided into distinct sections. Each section is designed to address specific correctional concerns and aid in assuring that all inmates are classified in a fair, objective manner. The specific sections considered are:

1. An inmate's history of institutional violence
2. The severity of the current offense(s)
3. The inmate's number of felony incarcerations
4. Any escape history of the inmate
5. The inmate's history of drug or alcohol abuse
6. Stability factors contributing to the inmate's rehabilitation

Under each specific category related criteria are supplied from which the one factor most applicable to the inmate is chosen. Assigned to each factor is a specific point value. After all relevant points the inmate is to receive has been determined, they are added together to arrive at the inmate's total score. If the inmate's total score is 11 points or more that score becomes the "final score." Ten points or less requires additional scoring. For this additional scoring, "administrative factors" are considered. In this category there are 4 factors which are considered:

1. Is there more than 90 days good time or any non-restorable good time loss?
2. Is there more than 60 months remaining to parole eligibility or release?
3. Was the inmate returned from a level 1 or 2 facility within the past 90 days where they received a major disciplinary conviction?
4. Were there any charges scored in the highest category when the severity of the current offense was addressed or any pending charges?

If the caseworker determines that one or more of these factors may be applied to the inmate, 10 additional points are added to the inmate's total score and this becomes the final score upon which the inmate's custody level is established.

Inmate Custody Levels

There are 5 custody levels that an inmate may be assigned to. These levels take into consideration the final score, *i.e.*, "point score" obtained from the Initial Custody Form. The 5 custody levels are:

1. Community: This level requires a point score of 10 points or less for an inmate to be assigned to this level, with no good time loss or pending felony charges. In addition, they must be within 18 months of parole eligibility or minimum serve out date, not serving a felony escape, not had a prior community custody level during which they received a write-up, and, if serving a sentence for a crime in which a life was taken or a Class "B" felony involving violence, already met the Parole Board for their original hearing.

2. Minimum: This level requires a point score of 10 points or less. At this level inmates may participate in programs and work outside of perimeter of the institution. However, they must be within 48 months of parole eligibility or minimum serve out. A subcategory of this level is "restricted custody." For this level, the inmate must be within 60 months of parole eligibility or minimum expiration date, and be in need of a period of observation/ adjustment. Restricted custody inmates are required to be housed inside the institutional perimeter but may work outside under direct supervision.

3. Medium: The inmate must score between 11-20 points to be eligible for this level. At this level the inmate may work outside the institutional perimeter but must be supervised by an armed officer.

4. Close: For this level the inmate must score between 21-33 points. In close custody the inmate may participate in programs inside institution but during all movement outside the perimeter full restraints are required.

5. Maximum: 34 or more points requires an inmate to be placed in this level. The inmate may participate in work or programs within the institution but shall be housed individually. For all outside movement full restraints are required.

Irrespective of the inmate's actual point score, if the committee believes the initial custody level obtained is inappropriate, with the existence of certain other factors, an "override" may be applied to the inmate. Once applied, this override changes the point score and custody level of the inmate. Thus, while otherwise eligible for a lower custody level an override can be utilized to insure an inmate remains in a more secure institution, "behind the fence." An override may, however, also be applied where a lower custody level is indicated.

There are 9 specific overrides that may be applied. Examples of these, are: nature/severity of the offense, psychiatric needs, the presence of a detainer, the inmate is considered an escape risk, there is no PSI, and a lower level is warranted. The presence of several other factors may affect an inmate's custody level as well, *e.g.*, instances where the inmate has been convicted of certain sexual offenses, a murder conviction or a Class "A" felony, an escape that has occurred within the last 5 years, Robbery or Assault 1st or Complicity to Commit those offenses, a crime that resulted in death of victim(s) or serious physical injury, having committed a felony while in community custody, or if serving a felony escape or violent offense sentence and they have a previous violent felony conviction or more than 2 previous violent misdemeanors. The final custody level of the inmate plays a vital part in classification process and assists DOC staff in determining the appropriate institution to which the inmate will be assigned.

Institutional Security Levels

There are 4 security levels of institutions within the DOC and each institution is assigned to a specific level. These differing levels and the specific institutions assigned to each level are:

1) Level 1 Facilities:
Level 1 facilities are the various Community Based Programs, Half Way Houses, Contract Facilities, and Jails.

2) Level 2 Institutions:
These institutions have a clearly designated perimeter. Inmates may be housed in a room, dormitory or single living area. Holding cells may also be located within this level institution. The institutions in this level include: Bell County Forestry Camp, Frankfort Career Development Center, Marion Adjustment Center, Blackburn Correctional Complex.

3) Level 3 Institutions:
Institutions of this level must have a secure perimeter that may include a tower occupied 24 hours a day by guard staff or some form of external patrol or detection device. Inmates may be housed in cells, rooms or dorms. The institutions in this level include: Eastern Kentucky Correctional Complex, Green River Correctional Complex, Kentucky Correctional Institution for Women, Kentucky State Reformatory, Lee Adjustment Center, Luther Luckett Correctional Complex, Northpoint Training Center, Roederer Correctional Complex, Western Kentucky Correctional Complex.

All custody levels of inmates may be housed in level 3 institutions, but the highest level inmates (maximum custody) must be placed in a secure area unless, with approval of the Classification Branch Manager they are assigned to general population. Also, with approval of the institutional warden, inmates with a maximum custody level may be housed at

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Eastern Kentucky Correctional Complex (EKCC) in the Enhanced Supervision Unit, at the Kentucky State Reformatory (KSR) for mental health or medical treatment, within the general population at Kentucky Correctional Institution for Women (KCIW).

4) Level 4 Institutions:

These facilities have secure housing in cells, a secure perimeter with a tower occupied 24 hours a day by guard staff and may have an external patrol or detention devices. Kentucky's level 4 institution is the Kentucky State Penitentiary (KSP) located in Eddyville. All custody levels may be housed at KSP and a Special Security Unit and a Protective Custody Unit for males is also located at this institution.

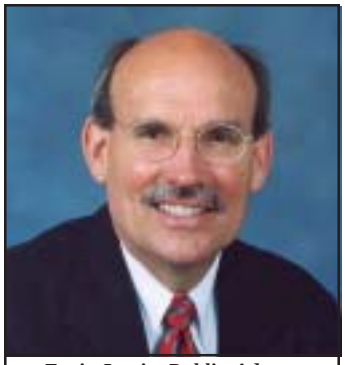
The inmate's level of custody and the institutional security level are only 2 factors used to determine where the inmate will be initially transferred. Additional considerations that play a role in the placement of the inmate include:

1. What area of the state the inmate is from or their family is located?
2. At what institutions is space available?
3. What specific skills does the inmate possess and where can those skills best be utilized?
4. What specific schooling or job related training would best equip the inmate for their return to society?
5. What type of specialized counseling does this inmate need?
6. Does the inmate require specialized medical or mental health attention?
7. How has the inmate's conduct been during incarceration?

In Part 2 of this series we will explore the various school and job related programs, available counseling services, provisions for medical and/or mental health treatment, and how their availability and the inmate needs may affect your client's placement. We will also take a more in-depth look at what the client may expect in the way of religious expression, correspondence, visits, factors affecting their release from incarceration and several other matters so often taken for granted. Even at this point however, it should be easy to see where the learned trial attorney, armed with knowledge of these numerous factors, which ultimately effect the inmate's placement, is in a much better position to negotiate with the prosecutor and better able to assist the client in their understanding the effects specific convictions may have on their incarceration. ■

DPA AT FAUBUSH

PLAIN VIEW . . .



Ernie Lewis, Public Advocate

Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, et al.
124 S.Ct. 2451 (2004)

Many of us learned in law school that one of the hallmarks of our rights as American citizens was the right to be left alone. Indeed, the Fourth Amendment, written in order to protect citizens from overreaching by the government, had as one of its primary goals the protection of the right to be left alone. It is in that context that one should read *Hiibel*. I do so and shudder.

A person saw a man assault a woman in Humboldt County, Nevada. He called the Sheriff's Department, which responded by sending Deputy Sheriff Lee Dove. When Dove arrived, he found Larry Hiibel standing by the truck. A young woman was sitting inside the truck. Deputy Sheriff Dove approached Hiibel, who appeared intoxicated, and told him that he was investigating an assault. He asked Hiibel for identification. Hiibel declined and asked why the deputy wanted to see identification. Hiibel "became agitated" and "insisted that he had done nothing wrong." After several minutes of requests and refusals (11 times, it is noted in the opinion), Deputy Sheriff Dove arrested Larry Hiibel and charged him with "'willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office…" NRS 171.123 states that "[a]ny peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime…The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.'" Hiibel was convicted and given a $250 fine. Eventually the Nevada Supreme Court rejected Hiibel's appeal, and Hiibel obtained *cert* from the US Supreme Court.

The Court affirmed in a 5-4 decision written by Justice Kennedy and joined by Justices O'Connor, Scalia, Thomas, and Rehnquist. The Court began its analysis by noting that the Nevada statute was a "stop and identify" statute that has its roots in vagrancy statutes. Vagrancy statutes have come under some disrepute in recent years, notably in *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) which held a vagrancy law to be unconstitutional because it gave law enforcement officers "unfettered discretion in the enforcement of the law," and *Brown v. Texas*, 443 U.S. 47 (1979), in which the Court "invalidated a conviction for violating a Texas stop and identify statute." Again, the Court was concerned about "arbitrary and abusive police practices" involved in a stop and identify statute.

The Court narrowed the question in light of *Papachristou* and *Brown*. The Court noted that the stop was based upon a reasonable suspicion, and that Hiibel had not attacked the stop and identify statute as unconstitutionally vague. The Court characterized the Nevada statute as constitutional because all that is required therein is for the suspect to give his name. Thus the question is narrowly drawn: can a person be arrested for failing to give her name?

The Court held that the arrest in this case did not violate the Fourth Amendment. "Asking questions is an essential part of police investigations…Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops…Obtaining a suspect's name in the course of a *Terry* stop serves important government interests." The Court viewed as not controlling the statement from *Berkemer v. McCarty*, 468 U.S. 420 (1984) that one reason *Terry* stops are not subject to the requirements of *Miranda* is that the detained person "'is not obliged to respond.'" "The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop. The reasonableness of a seizure under the Fourth Amendment is determined 'by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'..The request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity."

There is a significant limitation on the power to arrest for refusing to reveal one's identity. The request for identification must be reasonably related to the circumstances establishing the articulable suspicion. "[A]n officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop."

The Court also holds the Nevada statute is not in violation of the Fifth Amendment. "The Fifth Amendment prohibits only compelled testimony that is incriminating…In this case petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him."

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Justice Stevens wrote a dissenting opinion joined by Justices Souter, Ginsburg, and Breyer. The dissent was devoted to the Fifth Amendment issue rather than the Fourth Amendment issue. "A person's identity obviously bears informational and incriminating worth, 'even if the [name] itself is not inculpatory.'..A name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases. And that information, in turn, can be tremendously useful in a criminal prosecution. It is therefore quite wrong to suggest that a person's identity provides a link in the chain to incriminating evidence 'only in unusual circumstances…The officer in this case told petitioner, in the Court's words, that 'he was conducting an investigation and needed to see some identification.'…As the target of that investigation, petitioner, in my view, acted well within his rights when he opted to stand mute."

Williams v. Commonwealth
2004 WL 1906170, 2004 Ky. LEXIS 181 (2004)

This is an exceptionally important case that sets the tone for how the Fourth Amendment and Section Ten will be enforced and interpreted in Kentucky. The holding is one that is hardly expansive of the privacy rights of Kentucky citizens. The Court holds that a police officer may take a tip that does not give the basis of knowledge from a confidential informant followed by an investigation that does little more than generally corroborate the tip and without a warrant take the citizen handcuffed into an apartment and conduct a search of the citizen's buttocks.

An informant told a police officer that "a black male named Jermaine would be driving a blue El Camino with gray primer spots, and that he would be picking up another black male named Jason Burdette at a designated apartment complex in Jefferson County. According to the informant, Jermaine was a known drug trafficker, and he would be carrying a large quantity of crack cocaine in his buttocks." The informant was a "proven reliable confidential informant concerning drug trafficking."

Louisville officers began to watch Burdette's apartment. They saw Jermaine Williams drive up in a blue El Camino with gray primer spots. The officers surrounded the car and asked to search the car. Williams agreed. Nothing was found in the car. At that point, Williams was handcuffed and taken into Burdette's apartment for questioning. When he denied having any drugs or weapons on him, the officers told him about the tip. They then took him into the bathroom and found a plastic bag containing crack cocaine in his buttocks.

After indictment, Williams moved to suppress the evidence. When the motion was denied, he went to trial where he was convicted of first-degree trafficking and being a second degree persistent felony offender, for which he received a 12 year sentence. On appeal to the Court of Appeals, the decision denying the motion to suppress was affirmed. The Supreme Court of Kentucky granted a motion for discretionary review.

In a 5-2 decision written by Justice Graves, the decision of the Court of Appeals was affirmed, holding that "a corroborated tip from a known, reliable informant concerning the possession of cocaine and drug trafficking may provide probable cause for an arrest and search."

The Court rejected Williams' position that the officers lacked reasonable and articulable suspicion to stop Williams based upon a tip from a confidential informant. The Court used *Alabama v. White*, 496 U.S. 325 (1990) to hold that the officers could reasonably conduct a *Terry* stop. Like *White*, the Court found that the details of the tip by the informant had been corroborated sufficiently to establish a reasonable suspicion during the surveillance. Further, future acts predicted to occur did in fact occur. "We conclude that, under the totality of the circumstances, the informant's tip 'had been sufficiently corroborated to furnish a reasonable suspicion the defendant was engaged in criminal activity.'…Thus, the tip also had the sufficient objective indicia of reliability to be the sole basis for stopping Appellant.

The Court also rejected Williams' argument that once the search of the car failed to reveal anything, that the police then lacked probable cause to arrest him. The Court held that "even though the police did not discover any drugs or contraband in Appellant's car, they still had sufficient probable cause at that time to believe that Appellant was in the process of or about to commit a crime." The Court emphasizes that in *Maryland v. Pringle*, 540 U.S. 366 (2003), the Court had placed the probable cause concept at a relatively low level. "[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." "Applying these concepts herein, we conclude that the police officers had probable cause to arrest Appellant…The informant's information had accurately described the location of Burdette's apartment, the description of Appellant and his vehicle, as well as future predictive acts by Appellant."

Finally, the Court held that the police had probable cause to conduct a strip search inside Burdette's apartment. The Court noted that the officers did not have to obtain a warrant out of fear that Williams would destroy the evidence while they obtained the warrant.

Justice Johnstone wrote a dissenting opinion joined by Justice Stumbo. In Justice Johnstone's opinion, the police had a reasonable suspicion to stop Williams based upon the tip by the confidential informant. However, he did not believe that there was probable cause to arrest Williams based upon the same information.

In Justice Johnstone's opinion, Williams was clearly arrested at the point where he was taken in handcuffs to Burdette's apartment. "In my opinion, any reasonable person in Appellant's circumstances, especially one that has been read his *Miranda* rights and handcuffed, would believe that he was not at liberty to leave."

At that moment, there was no probable cause. "The officers' suspicion that Appellant was carrying narcotics was based entirely on the information provided by the confidential informant….Here, Detective Thomas had known the confidential informant for approximately five years and this informant had provided accurate information in the past. However, other factors severely undermine the reliability of the tip. First, the tip is extremely basic…Nor did the informant state his or her basis of knowledge, which further undercuts the reliability of the tip…Of course, in examining the totality of the circumstances surrounding the arrest, any deficiency in a tip's reliability can be supplemented by sufficient police corroboration…However, that did not occur in this case. The tip was so barren of predictive facts that the police had little information to corroborate. That Appellant in fact arrived at a given location in a certain car is simply not sufficient police corroboration upon which to root probable cause for an arrest and invasive body search."

Justice Johnstone also commented on the manner in which Williams was searched. "The officers here did not make a general investigation of Appellant's person; rather, they conducted a targeted and extremely humiliating search. Having absolutely no independent indication of contraband or unlawful activity prior to the search or the arrest, the officers' conduct cannot be accurately described as anything other than an exploratory search for incriminating evidence. Appellant was arrested in violation of his Fourth Amendment protections because his warrantless arrest was based on less than probable cause. We cannot retrospectively adjudge this search lawful simply because illegal contraband was eventually found. The protections of the Fourth Amendment must extend to offenders as well as the law abiding."

Carrier v. Commonwealth
2004 WL 1361595, 2004 Ky. LEXIS 155 (2004)

In January of 1999, the Livingston County Attorney filed an ex parte motion in district court called a "Verified Motion for Records." At the time he filed the motion, there was no case in the Livingston District or Circuit Court involving Clifford Carrier. The motion asked the court to order all of Carrier's psychological records in the possession of Dr. John Runyon. In the motion the County Attorney stated as his grounds that "Detective Kevin Pelphrey, Kentucky State Police, is conducting an investigation regarding sodomy and sexual abuse, by Mr. Carrier, of small children. Detective Pelphrey has the testimony of three (3) victims regarding said criminal sexual activity. Mr. Carrier advised Ms. Laverne Carrier, who is willing to testify, that he confessed his illegal sexual activity to Dr. Runyon, of Psychological Associates. The requested information is material to the Commonwealth's investigation." At the end of the motion, Detective Kevin Pelphrey certified "that to the best of my knowledge and belief, the contents of the foregoing motion are true and correct." The Livingston District Court entered an order stating that the Court had been "advised of the necessity of certain information in an ongoing investigation of the Commonwealth," followed by language requiring Dr. Runyon to release to Detective Pelphrey "any and all files, documents, and other information…regarding Clifford L. Carrier." Thereafter, records were seized, Carrier was charged, and his motion *in limine* to suppress the evidence taken from Dr. Runyon was overruled. Carrier entered a conditional guilty plea, and appealed to the Kentucky Court of Appeals. The Court of Appeals affirmed the judgment of the circuit court, finding that the evidence was not wrongfully obtained, and that it was not protected by the psychotherapist-patient privilege of KRE 507. The Kentucky Supreme Court granted a motion for discretionary review.

In a decision written by Justice Graves, reversed the Court of Appeals. The opinion in this case stands out as one of few putting meat on the bones of RCr 13.10. RCr 13.10 sets out the procedure for obtaining a search warrant, and includes the filing of an affidavit "sworn to before an officer authorized to administer oaths…" The purpose of the affidavit is to demonstrate to the issuing judge the existence of facts proving probable cause sufficient for the judge to issue a search warrant.

The Court of Appeals had found the County Attorney's verified motion to be "'essentially the equivalent of a request for a search warrant.'" The Court of Appeals also found that the detective's verification at the end of the motion "'would meet the requirements of RCr 13.10.'"

Not so, according to Justice Graves. "[C]ontrary to the requirements of RCr 13.10, there is no indication that the motion was 'sworn to before an officer authorized to administer oaths.' This 'affidavit' contains only bare allegations made by the county attorney and a certification by the detective. Notably, neither signature was even notarized. As such, the motion clearly fails to meet the procedural requirements of RCr 13.10 for an affidavit supporting a search warrant. The Constitutional demand of an oath or affirmation requires more than a mere verification of a police officer."

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The Court also found that the motion failed to demonstrate probable cause. "Under Kentucky Constitution §10, it is insufficient for an affiant applying for a search warrant to state his 'information and belief' of the existence of facts sought to be discovered by the warrant; rather the affidavit must be supported by a statement of facts sufficient to create probable cause."

The Court was particularly concerned about the lack of specificity in the motion. "Other than Appellant's ex-wife's assertion, it does not appear from the motion that either the county attorney or the detective had any independent knowledge of Appellant's psychological treatment history with Dr. Runyon, or even that such existed. The motion is void of any information as to when the treatment occurred, when Appellant allegedly confessed to Dr. Runyon, when Appellant informed his ex-wife that he had done so, or whether Dr. Runyon had ever filed a report of misconduct."

Justice Keller dissented, joined by Justice Wintersheimer. The Fourth Amendment/Section 10 issue was not preserved in either the trial court or the Court of Appeals, according to the dissenting opinion. Instead, trial counsel had challenged the entry of the evidence based upon the fact that due process was violated by the county attorney's use of an ex parte motion that had eliminated his opportunity to assert the psychotherapist/patient privilege. Appellate counsel had raised the issue, among others, "that the procedures were not those to obtain a search warrant." The Court of Appeals "gratuitously addressed the Motion as an affidavit providing probable cause for the seizure of the records." According to the dissent, "'it goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court.'"

The dissent also addressed RCr 13.10 on its merits, finding the majority to be "hypertechnical." Citing *Gossett v. Commonwealth*, Ky., 426 S.W. 2d 485 (1968), the dissent stated that when "a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than commonsense, manner." "[T]he fact that the affidavit in Appellant's case does not appear to have been notarized, although a violation of RCr 13.10, is not a violation of such proportions that the Appellant was deprived of due process."

The dissent also believed that the "affidavit" demonstrated probable cause. The "affidavit" noted that the detective had obtained statements from three child victims and the appellant's wife. The dissent believed that because the appellant's wife was named in the "affidavit" and because that was corroborated by three victims' statements, that this was sufficient to overcome the fact that the "affiant" had no first hand knowledge.

Finally, the dissent would rely upon the good faith exception in this case as another reason to affirm the Court of Appeals.

Pate v. Commonwealth
Ky., 134 S.W.3d 593 (2004)

Kathy Pate went to the Sheriff's Office in Pendleton County to fill out a domestic violence complaint against her husband, Lawrence Elmer Pate. While there, she told a deputy sheriff that she, her husband, and Alicia Gregg had been to Illinois the previous weekend and had brought back an anhydrous ammonia tank that was parked at Gregg's trailer. She also described her husband's car, and stated that he was armed with a .38 handgun. The deputy sheriff went to the residence and took steps to deal with the tank, which he believed was at risk of exploding. He then saw a car that looked like it fit the description given by Pate's wife. Pate was pulled over, and license number was confirmed, Pate was ordered out of the car and placed onto the ground where he was handcuffed and arrested. A search of Pate and the car failed to reveal the .38, although .38 shells were found along with methamphetamine precursors. Pate was charged with manufacturing methamphetamine and carrying a concealed deadly weapon. Pate's motion to suppress was denied. He was convicted at a jury trial, and sentenced to 20 years in prison.

In an opinion by Justice Keller, the judgment was affirmed. Specifically, Pate challenged the stop and the arrest. The Court agreed with the trial court that there was probable cause or at least an articulable suspicion to stop Pate's car based upon the information the deputy sheriff had received from Pate's wife connecting Pate to the anhydrous ammonia tank. "Deputy Peoples had been informed by a reliable source that Appellant was engaged in criminal activity and would be carrying a weapon. Deputy Peoples had independently confirmed the presence of the anhydrous ammonia at the Gregg residence that Kathy Pate had linked to Appellant. Appellant was approaching the Gregg residence. So, Deputy Peoples had a reasonable articulable suspicion that Appellant was engaged in criminal activity, and in order to ensure his own safety, he reasonably believed that it was necessary to order Appellant out of the car and onto the ground. After Appellant got out of the car and left the driver's side door open, Deputy Peoples approached the car, and the methamphetamine precursors in the vehicle came into plain view. In the context of the information that Kathy Pate had provided to Officer Peoples regarding the anhydrous ammonia, his discovery of the anhydrous ammonia tank on the Gregg property, and the fact that Appellant was approaching the Gregg property with Alicia Gregg in a car filled with methamphetamine precursors, we find that under the totality of the circumstances, Deputy Peoples had probable cause to believe that Appellant was manufacturing methamphetamine and, thus, probable cause to arrest him."

Collins v. Commonwealth
Ky., 142 S.W.3d 113 (2004)

A person called 911 from a Grant County gas station and stated that a "white, male driver of a white Chevrolet Blazer was seen throwing liquid from a bottle toward another vehicle at the Ezy-Stop gas station in Williamstown." The caller, who did not identify herself, said the liquid was alcohol and she thought there was a dispute between the two drivers. She said that the Blazer pulled out of the gas station and got on southbound I-75. She gave the license number. This information was relayed to Trooper Oliver, who saw the Blazer with the given license number. Trooper Oliver followed the Blazer for two miles and did not see a violation of the law. Oliver pulled the car over, detected an odor of alcohol, and performed a field sobriety test. After arrest, a blood alcohol test conducted at the Grant County Detention Center revealed Collins' BA to be .186.

Collins moved to suppress the results of the blood test, with that motion being denied. He then entered a conditional plea of guilty to DUI third and operating on a suspended license. He appealed to the Court of Appeals, which affirmed his conviction. The Supreme Court granted discretionary review, and in a decision written by Justice Johnstone, reversed the decision of the Court of Appeals.

The Court ruled that there was not a reasonable and articulable suspicion to pull over Collins' Blazer based upon the anonymous tip to 911. The Court relied upon *Alabama v. White*, 496 U.S. 325 (1990) and *Florida v. J.L.*, 529 U.S. 266 (2000). The Court noted that both *White* and *JL* "emphasize that predictive components are especially important to the reliability of an anonymous tip because they provide the police with a means by which to test the knowledge of the tipster." In the Collins case, the Court concluded that "the information supplied by the anonymous tipster lacked sufficient indicia of reliability to justify the investigatory stop performed on Appellant." There was no predictive information in the tip. "[R]ather, it consisted almost entirely of information readily available to a casual bystander, such as Appellant's license plate number, his direction of travel, and the make and model of his vehicle. Thus, Trooper Oliver was left with no predictive information to corroborate, or other means by which to verify that the tipster had intimate knowledge of any illegal behavior."

In addition, the Court noted that the reliability of the anonymous tip was also "diminished because the investigating officer did not independently observe any illegal activity, or any other indication that illegal conduct was afoot. Anonymous descriptions of a person in a certain vehicle or location, though accurate, do not carry sufficient indicia of reliability to justify an investigative stop."

This is an important case of which counsel needs to be aware whenever they have a situation with an anonymous tip. The Court is going to look carefully at whether there are sufficient indicia of reliability, with a focus on whether the tip included information regarding illegal activity, and whether the tip predicts future behavior that can be corroborated by the police. "We do not believe that reasonable suspicion can be predicated upon an unidentified person's accurate description of another vehicle and driver, coupled with the bare assertion that the driver had engaged in what might be considered offensive—though not criminal—conduct."

KACDL filed an amicus brief in this case. The amicus was filed by Wil Zevely of Florence and Tasha Scott of Covington.

Justice Graves wrote a dissenting opinion joined by Justice Wintersheimer. In the view of the dissent, "Trooper Oliver's investigatory stop was more reasonable than the conclusions drawn by the Majority. The accurate tip from an anonymous citizen, reporting dangerous behavior to the police for the immediate safety of the highways, had more than sufficient indicia of reliability to justify an investigatory stop." The dissent emphasized that the tip in this case came from a citizen rather than a "professional" informant. Further, the dissent noted that neither *J.L.* nor *White* require officers to corroborate criminal activity.

Justice Wintersheimer wrote a dissenting opinion as well, joined by Justice Graves. This dissent asserted that "the unusual behavior coupled with an apparently aggressive act, were both indicative of illegal activity and sufficiently predictive of future misconduct so as to warrant a *Terry* stop. The behavior observed and reported by the informant was predictive rather than speculative. It gave rise to a reasonable suspicion that the driver 'hurling the projectile' and setting off to drive on public roadways might be a likely candidate either for a DUI offense or potentially as a perpetrator of road rage."

Hardy v. Commonwealth
2004 WL 1125165, 2004 Ky. App. LEXIS 145 (Ky. Ct. App. 2004)

In October of 2002, Hardy was riding in a car with bad taillights driven by his girlfriend in Lexington. It was 1:00 a.m. Two officers stopped the car. The officers asked for identification from both persons in the car. It took 20-30 minutes to run a background check on the licenses. The background check revealed a warrant for Hardy's arrest. Hardy was arrested, and the subsequent search incident to arrest revealed 35.4 grams of crack cocaine. Hardy was indicted, and filed a motion to suppress, which was overruled. He entered a plea to 5 years, and filed an appeal.

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The Court of Appeals affirmed the trial court's decision in an opinion written by Judge Johnson and joined by Judges Taylor and Vanmeter. Hardy challenged the legality of the police refusing to allow him to leave the scene when he was being held for a background check. The Court held that even if the 20-30 minute detention of Hardy was illegal, that the finding of the arrest warrant dissipated the taint of any illegality. The Court cites *Baltimore v. Commonwealth*, Ky. App., 119 S.W. 3d 532 (2003) and *United States v. Green*, 111 F. 3d 515 (7th Cir. 1997) for this proposition. In *Green*, the Court held that "although the initial stop of the vehicle in question was unlawful, the officers' subsequent determination that an occupant of the vehicle had an outstanding arrest warrant constituted an 'intervening circumstance' which dissipated the taint caused by the unlawful stop." "Therefore, considering the fact that Hardy was arrested pursuant to a valid outstanding warrant, this 'intervening circumstance' outweighed any possible misconduct on the part of the officers in detaining Hardy while waiting for the results of this background check. Therefore, since Hardy's arrest was lawful, the search of his person incident to that arrest was also lawful."

The Court also rejected Hardy's argument that the stopping violated the Lexington Police Department's policy against racial profiling. The Court stated that there was nothing in the record other than the fact that Hardy was black to indicate that racial profiling occurred in this case. The Court also states that there is no remedy for the violation of Lexington's racial profiling policy. "'[T]he so-called "exclusionary rule" applies only to evidence obtained in violation of a constitutional right,' not to violations of internal police procedure."

The reader should remember that what we have in this case is a car carrying two black people who were stopped for a bad taillight at 1:00 a.m. in Lexington, and that the police decided to hold the black occupants for 30 minutes while a background check was conducted. Most of us would view this as significant interference with our liberty. *Whren* has prohibited the examination of pretextual arrests based upon such matters as race. On the other hand, Kentucky has declared as a matter of state policy that racial profiling is illegal. This decision declines to enforce the state policy and crafts no judicial remedy for its violation, relying upon the internal discipline of the officer. Further, the panel does not set an outside limit on how long the police may hold someone who has committed only a violation for a "background check." The exclusionary rule is explicitly crafted in order to deter police misconduct. An opportunity was missed in this case to utilize the exclusionary rule to enforce not only the Fourth Amendment and Section Ten, but also the state's racial profiling statute.

Travis v. Commonwealth
2004 WL 1125155, 2004 Ky. App. LEXIS 149 (Ky. Ct. App. 2004)

This case also followed the entry of a conditional guilty plea after the denial of a suppression motion. Judge Johnson wrote the opinion, joined by Judges Taylor and Vanmeter.

This case began on May 20, 2002 at 3:30 in the morning, when a Deputy Sheriff saw a pickup truck parked on the side of a highway in Marshall County. As the Deputy approached the truck, he smelled what he thought was ether coming from a rubber container in the bed of the pickup. Travis and his girlfriend were sitting in the front of the pickup, and appeared "nervous" when approached by the deputy. A background check revealed a valid license and no outstanding warrants. Curiously, however, the deputy was also told during the background check to "be alert for 'a possible 218.'" The deputy asked for consent to search, and Travis would not give consent. Travis then began "flapping his arms," which caused the deputy to be concerned for his safety. Travis was handcuffed as a result, but was told he was not under arrest. The deputy then asked Travis' girlfriend for consent (apparently while her boyfriend was in handcuffs). Travis told her not to consent, so the deputy placed Travis into the back seat of the police cruiser. Unbelievably, the deputy told Travis he was "not at that time under arrest." When the girlfriend told the deputy that her mother owned the pickup truck, the deputy called the mother and asked her for consent. Ultimately, the mother gave her written consent allowing for a full search of the pickup. The search revealed a variety of items used in the manufacture of methamphetamine. Travis and his girlfriend were placed under arrest.

The Court first rejected Travis' argument that the initial encounter was illegal because there was no reasonable and articulable suspicion. The encounter was legal under the "community caretaking" function established in *Cady v. Dombrowski*, 413 U.S. 433 (1973). "[W]e hold that Deputy Mighell was justified in pulling up behind the parked pickup truck, regardless of the fact that he may have lacked, prior to his pulling up behind the vehicle, reasonable, articulable suspicion that criminal activity was afoot."

The Court also rejected Travis' argument that he was unlawfully seized when the deputy asked him for identification, since the purpose of the stop was "community caretaking." The Court held that the asking for identification was justified by a reasonable, articulable suspicion based upon the fact that the pickup was parked along the highway at 3:30 a.m., that the smell of ether was coming from a container in the bed of the pickup, and that Travis seemed anxious to leave the scene.

The Court further rejected Travis' argument that placing him in handcuffs and putting him in handcuffs was illegal. The Court relied upon *Michigan v. Long*, 463 U.S. 1032 (1983) to hold that it "was reasonable for Deputy Mighell to handcuff and to place him in the back of his police cruiser."

Finally, the Court held that the consent form signed by his girlfriend's mother legally allowed the search of the container. The Court held that the owner of the pickup had the authority to consent to the search.

United States v. Alston
357 F.3d 408, 2004 Fed.App. 0209P (6th Cir. 2004)

Kashiema Alston was traveling from Los Angeles to Hartford in January of 2002. Officers had received information from a drug task force that she might be involved in transporting illegal drugs. When she landed in Cleveland on her way to Hartford, three officers met her as she stopped to make a phone call. After a conversation, she consented to have her carry-on luggage searched. During the search of the luggage, one officer began to pat down Alston's "heavy" coat. The officer cut the lining of the coat and found packets of cocaine. After being indicted, Alston filed a motion to suppress, which was denied. After a jury trial, Alston was convicted and appealed to the Sixth Circuit.

In an opinion by Judge Martin, the Court affirmed the decision of the trial court declining to suppress the evidence. The Court held that Ms. Alston was not seized during the initial encounter with the police. Because Alston did not challenge her consent, the Court further sustained the decision to admit the evidence. "Although there were three officers on the scene, only Officer Johnston approached the defendant while the other officers remained some distance away. Officer Johnston testified that he told Ms. Alston she was free to walk away, but Ms. Alston did not choose to do so. The encounter was very brief, and Ms. Alston was not asked to accompany the officers to a different location. Nothing in the record suggests that a reasonable person would not have felt free to leave."

United States v. Foster
376 F.3d 577, 2004 Fed.App. 0230P (6th Cir. 2004)

Two Cleveland police officers were patrolling on foot an area near an apartment complex that had produced 85 arrests for PCP. They saw Foster get out of a car and walk towards a dumpster. He then walked away from the dumpster toward the police officers. One officer said that as he walked by, the officer could smell PCP. The officers began to question Foster, who asked if he could return to his car. The officer handcuffed Foster and searched him for weapons. Then they took Foster to his car. When they opened the door to the car, they smelled marijuana. Foster agreed that there was marijuana in the car. As the officer leaned into the car to get the marijuana, he saw a gun under the driver's seat, and also saw two vials of PCP as he retrieved the gun. Foster was then arrested. After indictment, Foster moved to suppress, with that motion being denied. He was sentenced to 262 months' imprisonment after a jury trial, and appealed his conviction to the Sixth Circuit.

The Sixth Circuit affirmed the lower court in a decision written by Judge Moore joined by Judges Nelson and Friedman. The Court first held that the initial encounter between Foster and the police did not violate the Fourth Amendment. The Court noted that the police could approach Foster and ask him his name under the authority of *Hiibel v. Sixth Judicial Dist. Ct. of Nevada*, 124 S. Ct. 2451 (2004).

The Court ruled that the officers had a reasonable suspicion to conduct a *Terry* stop based upon smelling PCP upon Foster's person when he first passed them. The Court also noted that this took place near an apartment where 85 PCP-related arrests had occurred. The police were allowed to handcuff Foster during the pat down because in the officer's experience persons under the influence of PCP can become violent. "First, it was Foster who made the request to be returned to his vehicle because he was cold. Higgins, considering this and knowing that people on PCP can become extremely violent, handcuffed Foster not only to conduct the pat-down but also to be able to place Foster in his car and out of the cold, without having to worry about the possible weapons in Foster's car that he could reach."

Finally, once the officers placed Foster in his car, they smelled marijuana, providing them with probable cause to search the car without a warrant. "This therefore turned a lawful *Terry* stop into a lawful search. As a result, because the officers had probable cause to search the vehicle, the marijuana, gun, and PCP recovered from the car were all properly admissible against the defendant."

United States v. Jacob
377 F. 3d 573, 2004 Fed.App. 0240P (6th Cir. 2004)

Jacob and Gallardo were staying in two hotels in Beachwood, Ohio. A drug task force received information about Gallardo and went to investigate him. They had a dog sniff his Camry parked outside the hotel, and the dog alerted. The next day, Gallardo picked up Jacob from his hotel, along with a woman. The police followed the Camry, and eventually stopped the car when it appeared that the car was trying to elude police surveillance. Jacob and Gallardo were placed on the ground, and marijuana and $1000 was found on Jacob. They were handcuffed and put into the back seat. A drug dog again sniffed the Camry, and the dog again positively alerted. The police searched the car and discovered a green duffel bag with 4 bricks of marijuana and 8 bricks of cocaine. Jacob and Gallardo were indicted, and their motions to suppress were overruled. Jacob pled conditionally and Gallardo was

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convicted after a jury trial. Both appealed to the Sixth Circuit.

The Sixth Circuit affirmed in an opinion written by Judge Kennedy and joined by Judges Shadur and Gilman. First, the Court found that there was a reasonable and articulable suspicion sufficient to stop the car. The facts supporting the suspicion were that Gallardo had paid cash when he checked into his hotel room, that he was from Arizona which is "a source state of narcotics that enter the Cleveland area," that Gallardo had been previously arrested for transporting narcotics, that the drug dog had alerted to the Camry while parked in the hotel parking lot, and that while being followed Gallardo and Jacob had engaged in "counter surveillance."

The Court further held that the reasonable suspicion ripened into probable cause sufficient to arrest both Jacob and Gallardo. The Court found that drawing their weapons was reasonable because the car had "lunged forward as if they were attempting to escape." Ordering the defendants out of the car and onto the ground "was also reasonable, as concern for the investigators' safety was at its height under those circumstances." Putting Gallardo into the police car was reasonable in order to allow the police to investigate further. "Since the investigators' conduct in effectuating the stop and in detaining the suspects while they diligently pursued a means of investigation that was likely to confirm or dispel their suspicions was reasonable under the circumstances we conclude that the detention did not ripen into an unlawful arrest."

SHORT VIEW . . .

1. *Haase v. Commissioner of Public Safety*, 679 N.W.2d 743 (Minn. Ct. App. 2004). The Minnesota Court of Appeals has held that where an officer triggers the automatic sensor device on a closing garage door, the defendant maintains a reasonable expectation of privacy in the garage. Previously, the Court had held that leaving a garage door open meant that there was no reasonable expectation of privacy in the contents of the garage. The Court distinguishes their prior case due to the actions of the officer in interrupting the closing of the garage door by the defendant.

2. *State v. Lasaga*, 848 A.2d 1149 (Conn. 2004). A university computer administrator discovered that a professor was downloading child pornography and notified the police. He thereafter continued to monitor the downloading, and again notified the police. The police used the information obtained after the first notification to apply for and receive a search warrant, the execution of which led to the defendant's conviction. The Connecticut Supreme Court held that the administrator was not acting as an agent of the police when he continued to monitor the professor's illegal activity after notifying the police. Thus, this was a private search not covered by the Fourth Amendment under *Walter v. United States*, 447 U.S. 649 (1980).

3. *United States v. Isiofia*, 370 F.3d 226 (2nd Cir. 6/1/04). The police made a controlled delivery of a package that had been ordered using stolen credit cards, without also applying for a warrant. When the defendant answered the door, he was arrested and placed in handcuffs and then questioned. A protective sweep that lasted for 2 minutes was also conducted. Thirty minutes after the arrest, the defendant was given his *Miranda* warnings, and asked for consent to search the house. The defendant gave his consent, and the search revealed evidence leading to the defendant's conviction. The Second Circuit Court of Appeals affirmed the lower court's order suppressing the evidence found during the search of the home, saying that the 30 minutes between the arrest and the request for consent led to a coerced consent.

4. *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004). Under the Minnesota Constitution, a police officer may not make a custodial arrest of someone suspected of a traffic violation. The Minnesota Supreme Court held *Atwater v. Lago Vista*, 532 U.S. 318 (2001) would not be followed in Minnesota under their analogue to the Fourth Amendment. The Court is following similar decisions in Montana (*State v. Bauer*, 36 P. 3d 892 (Mont. 2001) and Ohio (*State v. Brown*, 792 N.E. 2d 175 (Ohio 2003).

5. *People v. Pitman*, 813 N.E.2d 93 (Ill. 2004). A barn outside of the curtilage may still be covered by the Fourth Amendment. Rejecting the state's "open field" argument, the Court held that the owner of the farm had a reasonable expectation of privacy in his barn.

6. *State v. Rabb*, 2004 WL 1392339, 2004 Fla. App. LEXIS 8795 (Fla. Dist. Ct. App. 2004). The police brought a drug-sniffing dog to a house based upon an anonymous tip. When the dog alerted, the police obtained a warrant, finding marijuana and other drugs. The Court held that when the dog was taken to the front door of the home, this became a search without probable cause. Relying upon *Kyllo v. United States*, 533 U.S. 27 (2001), the Court affirmed the trial court's suppression of the evidence found during the search. ■

KENTUCKY CASE REVIEW

Sam Potter

Billy Wayne Johnson v. Commonwealth
Ky., 134 S.W.3d 563 (2004)
Rendered 5/20/04, Final 6/10/04
Affirming in Part, Reversing in Part, and Remanding

Billy Wayne Johnson was convicted of one count of manufacturing methamphetamine, one count of possession of a controlled substance – methamphetamine, and several misdemeanor drug offenses. All his convictions were ordered to run concurrently for a total sentence of 20 years. He appealed as a matter of right, raising a number of issues.

A letter written by the defendant can be authenticated by examining its contents in order to uniquely identify the defendant as the author, though the recipient could not verify the signature. The Commonwealth sought to introduce at trial a letter written by the defendant shortly before his trial to a friend while the defendant was in jail. The recipient of the letter testified at trial, but could not authenticate it. He could not verify Johnson's signature, and he could not verify that the letter contained any information that uniquely identified Johnson as the author.

Citing KRE 901(a), the Court said that an item can be authenticated when the party offering it produces sufficient evidence that the item is what the party claims it to be. This can be done by showing the item's distinctive characteristics, including its contents. KRE 901(b)(4). This requires only a prima facie showing of the item's authenticity. The contents of the letter at issue in *Johnson* contained a trial date that corresponded to Johnson's trial, the names of several of Johnson's friends, and the name of a key prosecution witness. The Court found no error occurred in introducing the letter because its contents uniquely identified Johnson as the author. Further, no error occurred in allowing the jury to have it during deliberations.

Intent to manufacture methamphetamine can be inferred from the act of manufacturing methamphetamine, which satisfies the requirements of *Kotila v. Commonwealth*. For the manufacturing methamphetamine charge, the judge instructed the jury on the alternate theories (a) that Johnson actually manufactured methamphetamine or (b) that he possessed the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture it. Johnson argued that he was denied his right of being convicted only upon a unanimous verdict because the Commonwealth did not present evidence that would support a conviction under instruction (b) pursuant to the requirements of *Kotila v. Commonwealth*, Ky., 114 S.W.3d 226, 240-41 (2003).

Before directly answering this claim, the Court observed that sufficient evidence existed to convict him under instruction (a). The evidence at trial included five glass jars containing methamphetamine residue, one glass jar containing methamphetamine oil, and testimony from multiple people that put Johnson in possession of the chemicals and equipment or explained how he got possession of the chemicals and equipment. This evidence prompted the Court to write that "[a] necessary inference from proof of actual manufacture is that, at some point in time, he must have had possession of both all the equipment and all the ingredients necessary to manufacture methamphetamine." This inference was sufficient for the jury to convict him beyond a reasonable doubt that he possessed the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture it.

A defendant cannot be convicted of both manufacturing methamphetamine and possession of methamphetamine when the methamphetamine he possessed was the same he had manufactured. The Commonwealth's evidence did not suggest that Johnson possessed any other methamphetamine besides what was found in the five glass jars. This meant that he had been convicted of possessing the same methamphetamine that he had been convicted of manufacturing, which violated the double jeopardy clause. On a side note, this section of the opinion contains a good two-paragraph summary of how methamphetamine is manufactured.

A facilitation instruction is not warranted when no evidence suggests that someone else manufactured methamphetamine and the defendant testifies that he did not know methamphetamine was being manufactured on his property. There was evidence that other people knew how to manufacture methamphetamine, but neither the Commonwealth nor Johnson offered any evidence that these people manufactured methamphetamine on Johnson's property. Also, Johnson said on the stand he was not aware of how the jars containing methamphetamine got into his house. He did not say that he knew other people were manufacturing methamphetamine on his property. Because he did not know that a crime was being committed, the evidence did not support the giving of a facilitation instruction.

Spencer A. Baucom, JR. v. Commonwealth
Ky., 134 S.W.3d 591 (2004)
Rendered 5/20/04, Final 6/10/04
Reversing and Remanding

Baucom was serving felony time at a local jail. While on work release at the Humane Society, he stole the organization's work truck and unlawfully left the work site. He was found three

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months later in Nashville and then convicted of second degree escape, theft by unlawful taking over $300, and of being a first degree persistent felony offender. He was sentenced to 20 years in prison.

A defendant may make a limited waiver of counsel by specifying what services he desires from a lawyer and is then entitled by the Kentucky Constitution to a lawyer to perform those specified services. After being apprehended in Nashville, he proceeded pro se on the escape, theft, and PFO charges. However, he explicitly and repeatedly asked for the help of counsel in selecting a jury. The trial judge denied these requests and forced him to choose between proceeding entirely pro se or entirely with counsel. Baucom represented himself at trial and was convicted. He was represented by DPA on appeal.

The Court referenced § 11 of the Kentucky Constitution, noting that it explicitly guarantees a criminal defendant the right to be heard by himself and counsel. Out of this constitutional language grows the concept of hybrid representation. It allows a defendant to represent himself and still enjoy the benefit of counsel in specific areas that the defendant identified. Because the trial judge denied him this hybrid representation, the Court reversed Baucom's conviction.

Kentucky courts are required to apply the Kentucky Constitution when it affords greater protections to people than the Federal Constitution. The Court noted that most federal circuits and other states have not interpreted the Sixth Amendment of the Federal Constitution to include the concept of hybrid representation. The Court then said that "we are required to apply the Kentucky constitution because it affords greater protection for citizens who are accused of crimes."

Commonwealth v. Joshua Reynolds
Ky., 136 S.W.3d 442 (2004)
Rendered 6/17/04, Final 7/8/04
Certifying the Law

The Commonwealth asked the Supreme Court to certify the law on the issue of whether the Commonwealth can prosecute people less than 21 years only old under KRS 189A.010(1)(e) or whether the Commonwealth can elect to prosecute people less than 21 under subsection (1)(a). Subsection (1)(e) creates a per se DUI violation for people less than 21 who have a 0.02 alcohol level. Subsection (1)(a) creates a per se DUI violation for people who have a 0.08 alcohol level. Age is not mentioned in subsection (1)(a). According to KRS 189A.010(6), a person convicted under subsection (1)(e) cannot be subjected to the enhanced penalties based on multiple offenses of subsection (5). A person convicted under subsection (1)(a) is subject to the enhanced penalties of subsection (5).

KRS 189A.010(1)(e) does not require all people less than 21 years old to be prosecuted under this subsection. The Court acknowledges that (1)(e) is more intensely focused on the age of the person as opposed to the degree of impairment. The Court then pointed out that no language in (1)(a) limits it to people who are 21 or older. Since people less than 21 are not specifically excluded from (1)(a), they can be prosecuted under it. Subsection (1)(e) did not repeal by implication the applicability of (1)(a) to people less than 21 because (1)(e) did not explicitly negate (1)(a) and the two subsections are not disharmonious when read together. Thus, people less than 21 years old who have a blood alcohol level of 0.08 can be prosecuted under KRS 189A.010(1)(a). However, the Commonwealth still must give notice as to the subsections it intends to prove as required by *Commonwealth v. Wirth*, Ky., 936 S.W.2d 78 (1997).

People less than 21 years old who are convicted under KRS 189A.010(1)(a) are subject to the enhanced penalties of multiple offenses under subsection (5). Both parties stipulated that a conviction under (1)(e) could not be used for enhancement purposes. This is in accordance with subsection (6). Subsection (7), though, clearly directs that people who are less than 21 and have an alcohol level of 0.08 or greater be punished according to subsection (5). The Court concluded that people less than 21 who are convicted under (1)(a) are subject to the enhanced punishments of (5) for multiple convictions.

David R. Nichols v. Commonwealth
Ky., 142 S.W.3d 683 (2004)
Rendered 6/17/04, Final 9/23/04
Affirming in Part and Reversing in Part
To Be Published

David R. Nichols was convicted of wanton murder and assault under extreme emotional disturbance and found to be a second degree persistent felony offender and sentenced to life in prison.

Voluntary intoxication negates the *mens rea* element of specific intent offenses, but does not negate the *mens rea* element of wanton offenses. A voluntary intoxication instruction should be given when the defendant was too drunk to know what he was doing or when it negates an element of the offense. It requires more than mere drunkenness. The testimony of four Commonwealth witnesses and Nichols' statement to his arresting officer that he drank a pint of vodka and several beers warranted a voluntary intoxication instruction.

However, the trial judge's failure to do so was rendered harmless with respect to the murder charge because the jury convicted him of wanton murder instead of intentional murder. He was awarded a new trial on the assault charge though. The jury had only been instructed on intentional second degree assault. Not giving the voluntary intoxication instruction deprived him of the lesser included offenses of wanton or reckless fourth degree assault.

The defendant's intoxication did not require the suppression of his statement to the police the night of his arrest even though the evidence warranted a voluntary intoxication in-

struction. The Court examined Nichols' behavior when he made the statement to determine whether he was in sufficient possession of his faculties to give a reliable statement. The interrogating officer said Nichols told him how much he drank, but refused to take a breath test. He also signed a written *Miranda* waiver, but refused to give a taped statement. Further, he accurately described where he hid one of the knives. The officer testified that he did not think Nichols was under the influence of anything when he made his statements. This prompted the Court to conclude that the judge's decision to allow the statement was based on substantial evidence and thus admissible.

Commonwealth v. Christopher Charles Morris
Ky., 142 S.W.3d 654 (2004)
Rendered 6/17/04, Final 9/23/04
Affirming
To Be Published

Morris caused a car accident that injured a man, killed that man's wife, and killed their unborn child. The accident occurred on the way to the hospital for the mother to give birth. The unborn child was expected to be healthy upon birth. Morris pled guilty to second degree assault for the father's injuries and second degree manslaughter for the mother's death. He also entered a conditional guilty plea to second degree manslaughter regarding the death of the unborn child, which he appealed. The Court of Appeals reversed that conviction based on the "born alive" rule found in *Hollis v. Commonwealth*, Ky., 652 S.W.2d 61 (1983). The Supreme Court granted discretionary review to reconsider the rule in *Hollis*.

The felonious killing of a viable fetus can be prosecuted as a homicide under Chapter 507 of the penal code. The *Morris* Court began by discussing the history of the "born alive" rule. This survey covered the development of the thought and practice of this issue from the English common law of the mid 13th century to its application in colonial America to the pre-penal code case of *Jackson v. Commonwealth*, 265 Ky. 295, 96 S.W.2d 1014 (1936).

After this historical survey, the *Morris* Court moved on to criticize the post-penal code *Hollis* decision. The majority's chief criticism focused on the statutory interpretation that the *Hollis* plurality undertook. The *Hollis* plurality reasoned that the General Assembly intended to retain the "born alive" rule because it did not include a statutory definition to supersede the common law rule. That opinion relied on the fact that KRS 507.020 made no effort to define the word 'person.' The *Morris* Court noted however that KRS 500.080(12) and KRS 507.010 each define the word 'person' to mean a human being. The concurring opinion in *Hollis* rejected this flawed statutory construction, but believed that the "born alive" rule survived the adoption of penal code.

The *Morris* Court noted that the drafters of the Kentucky penal code based it on the Model Penal Code. But, while the MPC defined a human being as "a person who has been born and is alive," the Kentucky penal code did not adopt this definition. This reinforces the *Morris* Court's conclusion that the General Assembly did not incorporate the "born alive" rule into the penal code. The *Morris* Court also mentioned that *Jackson* used the "born alive" rule to establish the *corpus deliciti* element of common law murder, not as a definition.

The *Morris* Court remarked that the rationale for the "born alive" rule no longer exists because of the advances in medical science. This change has prompted some other courts to abandon the "born alive" rule and recognize that a viable fetus can be the victim of a homicide. The Court believes that competent evidence can prove viability in the same way it can prove a live birth. Based on these and several other reasons, the Court overruled *Hollis* and held that a viable fetus is a person for purposes of KRS 500.080(12) and Chapter 507.

However, because Due Process precludes retrospective application of this decision, the Court affirmed the result reached by the Court of Appeals. The fair warning doctrine of the Due Process Clause precludes a court from applying retrospectively an unforeseeable change in the common law or in the interpretation of a statute that detrimentally affects a criminal defendant. Thus, the Supreme Court upheld the Court of Appeals decision to reverse Morris' conviction of second degree manslaughter in regards to the unborn child, but for different reasons.

The definition of 'human being' found in the abortion statutes cannot be constitutionally applied to the homicide provisions of the penal code. KRS 311.720(6) defines 'human being' as "any member of the species homo sapiens from fertilization until death." That statute states that it applies to the abortion statutes of "KRS 311.710 to 311.820, and laws of the Commonwealth unless the context otherwise requires." The Court relied on § 51 of the Kentucky Constitution to limit that definition to the abortion statutes only.

The Ex Post Facto Clause precludes retrospective application of the fetal homicide statute to this case, and the Court did not consider any constitutional challenges to the fetal homicide statute. The Court mentions the fetal homicide statute of KRS 507A briefly. It defines 'unborn child' as "a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency." The Court refused to adopt this definition as the common law rule, which Justice Wintersheimer argued for in his concurring opinion. The Court explicitly refused to address whether killing a nonviable fetus would violate KRS 507.040. It also expects that future homicides of nonviable fetuses will be prosecuted under KRS 507A. Nor did it approve or disapprove of the definition of 'unborn child' found in KRS 507A.

The reenactment doctrine does not require continued application of the "born alive" rule. Justice Keller concurred in the result only, and Justice Stumbo joined his concurring opinion. Citing the reenactment doctrine, Justice Keller argued

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that when the General Assembly reenacted both KRS 507.020 and 507.040 after the *Hollis* decision and did not make any changes to the statute, then the *Hollis* definition of 'person' should still apply. The majority in *Morris* disagreed. It reiterated that *Hollis* was only a plurality opinion and that it did not attempt to interpret 'person.' Because there was no statutory interpretation for the General Assembly to reenact, the reenactment doctrine does not prevent the Court's overruling of *Hollis*.

The Court seems to imply the real possibility that the fetal homicide statute might not withstand a constitutional challenge. For what it is worth, the Court notes in a footnote at the end of the opinion that "In light of the enactment of HB 108, some might regard this entire exercise as a vain endeavor, since all future fetal homicides presumably will be prosecuted under new KRS Chapter 507A. However, should HB 108 not survive constitutional challenge, the decision in this case will attain future significance." The Court could be indicating which way it will settle a constitutional challenge to the fetal homicide statute. Alternatively, the Court could simply be reiterating that it did not review the constitutionality of the fetal homicide statute in this case. ■

DPA RECRUITMENT: FINDING TOMORROW'S PUBLIC ADVOCATE

Tim Shull

At Washington University, Al Adams and I met a prospective DPA employee named Amber. She asked us a question something like this:

"How do you deal with the frustration of not being able to help your whole client? You know, legal help is great, but poor people have lots of problems."

Amber's insight was impressive and her question was sophisticated. I took a glance at her resume again, and saw she had already done as much poverty work as I had done after being a licensed attorney for a year. We have been seeing a pattern, of students already experienced in poverty law and public service before they interview with us.

I answered this student, "Amber, someday, when you're the Public Advocate, we'll have a DPA Social Services Arm. So we'll help the whole person. DUI acquittal and drug/alcohol counseling, all under the same roof. That's my dream and hope."

Now, I am finding that my response to Amber has become a useful "pick-up line" in my recruitment efforts. I find myself telling lots of these budding advocates: "I'm looking for the Public Advocate in 2020." The reactions I get are gratifying.

At Vanderbilt, I met Neil. He told me about working at the New York City public defender's office last summer. He worked with a defense lawyer who, by accident, learned some valuable information about a crucial prosecution witness. Neil and the lawyer worked the grand jury situation in a sophisticated way, resulting in their client not even being indicted. What a great, real-life experience for a law student!

Neil says he wants to be a public defender. I believe him. I hope Amber joins him, and that both of them join us at DPA.

Tim Shull

We have visited several places already this recruiting season and have many more to go. Pikeville DPA Directing Attorney Harolyn Howard and London DPA Attorney Kristen Bailey are making law school visits in Grundy, Virginia, and at the Univeristy of Tennessee. Al Adams will work the Equal Justice Works Fair in Washington, DC. I interviewed 18 students at the Dallas Sunbelt Minority Recruiting Fair. The DPA Leadership Team visited the University of Louisville's Brandeis School of Law.

At all of these places, we are searching for tomorrow's Public Advocate.

If you are interested in applying for a position please contact:

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E-Mail: Tim.Shull@ky.gov

Further information about Kentucky public defenders is found at: http://dpa.state.ky.us/

Information about the Louisville-Jefferson County Public Defender's Office is found at:
http://dpa.state.ky.us/louisville.htm ■

PRACTICE CORNER

Margaret F. Case

Litigation Tips & Comments

Practice Corner is brought to you by the joint efforts of staff in DPA's Post Trial Division. Post-trial defenders are in a position to see patterns of practice across the state. Our goal is to share trends we notice and helpful ideas we come across.

Previously-Convicted Co-defendant

The prosecution may not put your client's co-defendant on the stand for the purpose of proving that the co-defendant has already been convicted.

It has been over 27 years since the Kentucky Supreme Court decided *Parido v. Commonwealth*, Ky., 547 S.W.2d 125 (1977). Some prosecutors seem to have forgotten about it. They need to be reminded:

> "Parido now asserts that the court committed error prejudicial to his substantial rights by permitting the Commonwealth to elicit from the co-indictee or co-defendant evidence that he had pleaded guilty to the crime charged and accepted the maximum penalty of twenty years. This court finds that such evidence presented in this manner is highly prejudicial to appellant's substantial rights, and its admission is error of such magnitude as to require reversal."

Over the years, there have been few cases elaborating on this black-letter law. The *Parido* principle has clearly made it to 2004 intact. *See Tipton v. Commonwealth*, Ky., 640 S.W.2d 818 (1982); *Commonwealth v. Gaines*, Ky., 13 S.W.3d 923 (2000); *St. Clair v. Commonwealth*, Ky., 140 S.W.3d 510 (2004).

Rules of Court

Are you sure you know all the applicable rules of court? So, you have memorized all the Kentucky Rules of Criminal Procedure, plus all the relevant Rules of Civil Procedure. Did you know that your local courts are also likely to have rules of practice, to which you and your client are subject? You ignore those rules at your peril.

One of DPA's veteran lawyers had a district court appeal dismissed by the circuit judge *sua sponte*, because the lawyer had not complied with a local rule requiring attachment of all legal authorities relied upon. Another DPA veteran lawyer had a motion returned by a circuit clerk without filing, because the page numbering on it did not comply with the local court rule on page numbering format.

Of course, those local rules are also arrows in your own quiver. Perhaps your opponent will one day run afoul of a local rule that he or she doesn't even know about . . . but you do! Your opponent may pay a price.

Look for local court rules on the Kentucky Court of Justice website, at www.kycourts.net/localrules/localrules.shtm.

Directed Verdict Motions

A motion for directed verdict has to be based upon some grounds. We have seen examples of defense counsel making directed verdict motions along these lines: "Your Honor, I know that I am supposed to make a motion for directed verdict now, but I really don't have any grounds." Such a motion will not preserve anything for the appeal.

Check out the new DPA preservation manual for an overview of the law on directed verdict motions. (And thanks to Karen Maurer for her excellent article.)

Notices of Appeal

Notices of appeal are very simple, very easy, yet often done incorrectly. A notice of appeal should probably be the shortest and easiest legal document you ever file. All it has to do is identify the decision from which you are appealing, and the names of the parties on appeal. (The form notice of appeal in the new DPA preservation manual shows you how to do it.)

Despite this being such a simple process, we see all sorts of embellishments added by defense counsel. Many of these are harmful.

For example, there is no need for your notice of appeal to list the legal issues that you believe should be raised on appeal. In fact, such a notice of appeal might lead to a prosecution motion in the appellate court, asking that your client be limited on appeal to only those issues enumerated in the notice. This would be very bad. (Instead, send your list of legal issues to DPA's Appeals Branch Manager, as required in indigency cases by KRS 21.219)

Likewise, there is no need for your notice of appeal to name any particular lawyer as representing your client on appeal. If you name the wrong person, (and it happens more often than you might think), your client's paperwork can get misdirected to the wrong staff in Frankfort and crucial deadlines can get missed.

Similarly, there is no need for your notice of appeal to name which appellate court the case is heading for. If you happen to get it wrong, your client's appeal can be subject to unwarranted delay, as we wend our way through the appellate motion practice necessary to get the case transferred to the right court.

Practice Corner is always looking for good tips. If you have a practice tip to share, please send it to the Department of Public Advocacy, Post Trial Division, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. ■

THE ADVOCATE

Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

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NOTE: DPA Education is open only to criminal defense advocates.

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For more information regarding NCDC programs:

Rosie Flanagan
NCDC, c/o Mercer Law School
Macon, Georgia 31207
Tel: (912) 746-4151
Fax: (912) 743-0160

Thoughts to Contemplate

If we are to keep our democracy, there must be one commandment: thou shalt not ration justice.

- Judge Learned Hand

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

- Hugo Black, U.S. Supreme Court Justice, 1964

Treat people as if they were what they should be, and you help them become what they are capable of becoming.

- Goethe